Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1999

JOHN DOE,

Petitioner

V.

THOMAS CONSTANTINE, Administrator, Drug Enforcement Agency and PETER F. GRUDEN, Special Agent,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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11687

QUESTIONS PRESENTED

1. Where petitioner's settlement agreement with DEA protected his employability by prohibiting DEA from disseminating unsupported defamatory allegations to his prospective employers, was recission of the agreement, on grounds which DEA has conceded are baseless, a "taking" without compensation in violation of the Fifth Amendment and was the recission and DEA's subsequent firing of petitioner also violative of his procedural and substantive due process rights under the Fifth Amendment?

2. Did the Third Circuit err by holding federal courts lack jurisdiction over petitioner's complaint seeking equitable relief for violations of his First and the Fifth Amendment rights caused by DEA's recission of the settlement agreement and his subsequent firing ?

2. Is the Merit Service Protection Board an unconstitutional Executive Branch "court" established in violation of Article III of the United States Constitution to the extent the Civil Service Reform Act purports to grant it power over constitutional claims of federal employees?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Doe prays that a writ of certorari issue to review the opinion and judgment of the Court of Appeals for the Third Circuit rendered in these proceedings on May 21, 1999.

OPINIONS BELOW

The United States District Court for the Eastern District of Pennsylvania dismissed the complaint for lack of subject matter jurisdiction on April 16, 1998 after one brief TRO hearing, holding that the complaint merely alleged a breach of contract and not constitutional violations. The unreported opinion of the District Court

is reproduced in the Appendix. (Ap. 16a-23a)[1]. On Appeal, the Third Circuit Panel affirmed in an opinion marked "Unreported—Not Precedential" filed May 21, 1999. (Ap. 2a-15a)

JURISDICTION

This Court has jurisdiction under 28 U. S. C. 1254(1).

STATUTES AND CONSTITUTIONAL AMENDMENTS INVOLVED

The relevant portions of the Federal Statutes and Constitution are reproduced in the Appendix. Ap. 24a-31a.

STATEMENT OF THE CASE[2]

Doe, a licensed Commercial pilot with an Instructor's rating, joined DEA in 1990 as Special Agent hoping to be assigned to its Air Wing. After initial training, Doe was assigned to the Cleveland Field Office of DEA. Soon he was merit- selected to participate in Operation Snowcap, an extraordinarily dangerous drug interdiction effort in which DEA agents, including Doe, were deployed for months

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1 . References to the Appendix are described as "Ap.__". Respondents are sued, inter alia, in their capacities as past and present officials of the Drug Enforcement Administration (DEA), a branch of the Department of Justice. For simplicity, Respondents and DEA are generally referred to as "DEA".

2 . This petition summarizes Doe's verified complaint, affidavits and other exhibits, as well as pertinent testimony and exhibits at the hearing on Doe's motion for a TRO on March 23, 1998. DEA has never answered Doe's complaint nor has it under oath in the record contradicted any of the following factual assertions herein.

in Central and South America. Doe successfully completed rigorous Army Ranger and Navy Seal training courses and an in-depth foreign language course, becoming fluent in the language most frequently used by drug cartel members. Doe and his Snowcap team were assigned to South and Central America with other DEA agents where they risked their lives conducting dangerous missions, such as blowing up drug labs. More than one of Doe's fellow DEA agents was killed during the missions they undertook. (Complaint, ¶5-6, Ap. 37a-38a)

After completion of his participation in Operation Snowcap, in September 1996 Doe was assigned to Newington, a facility (Group "X" in the Complaint) which has responsibility for matters of the utmost secrecy and sensitivity. (Complaint ¶ 7, Ap. 38a)

Throughout Doe's seven-year DEA career, he was always promoted in a timely fashion and was never rated lower than "fully successful" in his periodic reviews. He received an "Outstanding" rating following his three-month 1994 assignment to Columbia and for the period ending July 1996. (Attachment A to the Settlement Agreement, Exhibit A to the Complaint. (Ap. 67a) DEA has acknowledged that Doe's seven-year service record was exemplary and unblemished. (Complaint, ¶ 20, 20A, Ap. 45a)

In 1995, in Cleveland, Doe and Sterling, a senior DEA Special Agent, witnessed an illegal drug cash seizure by local area police and lodged a verbal "Whistleblower" report with their DEA Supervisor at the Cleveland Office. No corrective action was taken by DEA and the local police were permitted to keep 15-25% of the approximately $260,000 cash seized and DEA kept the balance. ***Thus, well prior to his 1996 assignment to Newington, Doe was on record at DEA as an***

agent who would report wrongdoing. (Complaint, ¶29-32, Ap. 48a-49a)

Then, at Newington from the fall of 1996 to October 1997, Doe discovered a serious pattern of security violations, sexual escapades and gross mismanagement as set forth in the complaint. (Complaint ¶ 34-44 Ap. 49a-53a) Pursuant to the "Whistleblower" Act, 5 U. S. C. 2302, (b)(8)(a), (B), (9), (10), [Ap. 27a-29a], Doe summarized the violations in writing substantially as they appear in the complaint and copies were delivered to the Office of Special Counsel (OSC) and to Hon. Curt Weldon, M.C., Chairman of the House Armed Services Subcommittee on Research & Development. (Complaint, ¶ 47, Ap. 55a) Congressman Weldon sent Doe's report and letter to Respondent Constantine on January 20, 1998, urging an investigation of Doe's allegations at Newington on an "emergency" basis. (Ap. 78a-79a) [3]

Following the 1995 "Whistleblowing" report in Cleveland, [4] DEA commenced an all-out intensive "background" investigation of

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3. Letter of Hon. Curt Weldon to Constantine January 20, 1998, Ap. 78a-79a and Complaint, ¶ 49 [first ¶ 49], Ap. 55a.

4. Without any evidence in the record the courts below concluded the background investigation was related to his Newington assignment and not in retaliation for Doe's Cleveland "Whistleblowing". However, Doe was assigned to Newington at the SCI level for 6 months before his "background" investigation was complete, a sequence clearly indicating the background investigation was prompted by the cleveland incident.

Doe's life. DEA concedes his service record was outstanding and produced no facts demonstrating any misconduct by Doe in his personal life.

Nevertheless, DEA sent Doe a "Firing Proposal" on March 15, 1997 (Complaint ¶ 12, Ap. 40a) The "Firing Proposal" is based upon the following unverified hearsay allegations: (1) DEA claims to have located a summer 1993 police call report, not in evidence, which DEA asserts reflects a call that Doe could be seen without clothes in his rented room 12- 3 AM; (2) that a teenage girl, "M" and her friend, "KS", had been caught spying (from M's darkened bedroom) on Doe in the privacy of his rented room during this hot summer period and (3) DEA claims its agents secured an affidavit from M alleging that Doe urged her to watch him .

However, DEA has to this day withheld M's alleged "affidavit" from Doe and the courts below even though M, in her alleged "affidavit", is the sole accuser who DEA claims supports the charge that Doe induced her to observe him in the privacy of his rented room in July 1993. Moreover, M's withheld "allegations" are flatly contradicted by the DEA-prepared affidavit of KS, M's co-"peeping tom", an affidavit DEA attempted to withhold until it was forced to turn it over to counsel for Doe just two days before the March 23, TRO Hearing. KS' affidavit completely exonerates Doe. From any charge that he attempted to induce either M or KS to observe him doing anything.[5]

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5. DEA did not reveal KS's exculpatory affidavit until two days before the TRO hearing, thereby depriving Doe's counsel of any chance to locate KS and possibly arrange for her to testify for Doe.

DEA also repeatedly threatened Doe and his counsel with criminal prosecution if they attempted to interview Doe's sole accuser, "M", about her supposed "affidavit". Indeed, at the TRO Hearing on March 23, 1998, Doe's Attorney, Mr. Bayless, testified (Tr. 36, Ap. 76a):

> "No we don't have a copy of Ms. Martin's [i. e. "M"'s] affidavit, which we felt was essential. *We were also denied the right to interview Ms. Martin or any other witnesses in Ohio, we were expressly prohibited from doing that by Mr. Greenley [sic, Greenlee] whom I contacted to request the right to go to Ohio.* ***[Doe] had been told that criminal charges would be brought against him in very broad terms and I told Mr. Greenley [sic] that we were concerned that that applied to his agents as attorneys and he told me that was in fact the truth."***

Doe engaged attorney Herman Bayless to represent him in contesting the charges in of the Firing Proposal. For more than four months, October 1997 until February 4, 1998, Attorney Bayless negotiated with Senior Attorneys of DEA, as directed by DEA's Deciding Officer, Mark Greenlee. (Complaint ¶ 13, Ap. 40a-41a) After those four months of negotiations, the parties voluntarily agreed to settle all differences between them.

Thus, DEA agreed to close all charges against Doe, to withdraw the "Firing Proposal" and to seal the unfounded and unproven allegations set forth in the "Firing Proposal" and any other adverse allegations that Doe engaged in "inappropriate conduct" or violated any rule, law, etc. Further, DEA agreed to send a letters of reference (in the form attached to the Settlement Agreement) to verify

his employment and superior evaluations to potential private sector employers in the event Doe left DEA. (Complaint, Exhibit A, Settlement Agreement Ap. 67a-75a)

The Settlement Agreement was signed February 4, 1998 after its approval by all required DEA lawyers and officials, including Deciding Officer Greenlee and DEA's Deputy General Counsel Gleason. (Complaint ¶13, Ap. 44a-45a)

Doe, a Commercial Pilot and Instructor, had applied for a transfer to DEA's Air Wing on several occasions during his DEA career. In January 1998 Doe applied again, but on February 9, 1998, Donnie Marshall, then Chief of the Air Wing [6] wrote Doe politely advising his request could not be accommodated. The Settlement Agreement was drafted on the basis that Doe might not be able to transfer to the Air Wing, in which case, Doe wished to resign in order to resume his commercial aviation career. (Settlement Agreement, ¶ c, App. 59a-60a) Thus, following receipt of Mr. Marshall's letter, acting in reliance upon the Settlement Agreement and in accordance with its terms (Complaint ¶ 16, Ap. 42a, Settlement Agreement, ¶ c, App. 59a-60a), Doe submitted his resignation on February 28, 1998 and proceeded to resume his private sector commercial aviation career including signing a $4000 contract with the Sheffield School of Aeronautics in Florida in mid-February where he commenced advanced commercial aviation training that month. (Complaint, ¶17, 17C, Ap. 42a-44a) Doe also began sending out job applications, with

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5. Mr. Marshall is now Acting Administrator of DEA following Respondent Constantine's resignation the day after the Third Circuit handed down its decision in this case.

the expectation that inquiries about his DEA career would be answered by DEA letter attached to the Settlement Agreement as Attachment A. (Complaint, 17B, Ap. 43a)

When Doe submitted his resignation by letter of February 28, 1998, as contemplated in the Settlement Agreement, Respondent Gruden replied on March 5, 1998, ***refusing to accept the resignation and "tendering it back" to Doe's Counsel***. Doe responded by letter dated March 5, 1988 that he had resigned pursuant to the binding Settlement Agreement and because he "has resigned and is now a former employee, there are no pending employment matters for you to decide." Gruden notified Doe by letter of March 12, 1998 (App. 77a) that, despite Doe's resignation, he wood "forestall taking any action with respect to the pending removal action against" him until on or after April 1, 1998. Gruden continued: ***"As previously indicated, you will receive 72 hours advance notice of any such action."*** On March 31, 1998, Doe sent another letter of resignation. DEA did not explicitly reject this resignation but nevertheless continued to consider him as its employee until they fired him.

DEA's refusal to permit Doe to resign contradicted its Counsel's express representation to the district court when challenged on this issue: ***"There's no problem with the plaintiff resigning. He has---certainly, he can resign."*** (App. 75a)

In their opinions, the courts below did not address Doe's two resignations or his argument that since he had resigned, he could not be "fired", nor did the opinions mention the unqualified commitment of DEA's counsel who represented to the district court that *"There's no problem with the plaintiff resigning. He has – certainly he can resign."*

(Tr. 16, Ap. 75a)

Within a few days after its execution, Richard Fiano learned of the Settlement Agreement via means not known. Fiano, a 20-year veteran of the old Federal Bureau of Narcotics ("BON")—now DEA--was (and may still be) the Special Agent In Charge of Newington, the ultra-secret facility *which is the precise target* of Doe's 1996-1997 "Whistleblowing" charges. ***DEA has never denied Doe's principal charges of serious security breaches at Newington, many of which are described in the Complaint. Indeed, DEA has conceded it is urgently seeking another site for the ultra-sensitive functions performed at Newington.*** [7]

Fiano immediately rushed to confer with another veteran DEA agent who is also an old BON colleague, Respondent Gruden, and they immediately went to Respondent DEA Administrator Constantine. In the next two weeks, Fiano, Respondent Gruden, and Respondent Constantine held at least two emergency meetings which led to a decision that, notwithstanding the Settlement Agreement signed by all parties on February 4, 1998 settled the Doe case, Respondent Gruden would appoint himself as a new "Deciding Officer" and send Doe a

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7 . There is some indication that a number of law enforcement and intelligence agencies also function at Newington, including military intelligence units, which would explain Congressman's Weldon's urgent demand that Respondent Constantine investigates Doe's charges on an "emergency" basis. Mr. Constantine resigned on May 23, 1998, the next working day following the decision of the Third Circuit and has been replaced by Donnie Marshall. Mr. Marshall has announced publicly that DEA is seeking another site to replace Newington.

letter on February 20, 1998 purporting to "rescind" the Settlement Agreement. The Recission Letter, Exhibit B to the Complaint (Ap. 68a-69a) asserts: "subordinate elements in this agency . . . lacked authority to bind the agency to the conditions . . . contained in the agreement. "[8]

Doe filed the complaint in the district court for the Eastern District of Pennsylvania on March 9, 1998. The emergency judge granted Doe's motion to seal the case under F. R. C. P. 26 (c). Doe also filed a motion for a TRO, which sought to enjoin DEA from firing him, and for other equitable and declaratory relief.

Although DEA's chief counsel, Cynthia Ryan, Esq., and Respondent Constantine approved Respondent Gruden's recission of the Settlement Agreement on the "lack of authority" rationale, this pretext was patently false since the Settlement Agreement was authorized by all necessary persons within DEA. Thus, DEA was forced to concede that the Settlement Agreement was authorized, a concession made by counsel for DEA at the March 23, 1998 TRO hearing before the district court:

> ***"The Government's position . . . is that we're not -- we're not saying that this agreement was signed by a junior DEA lawyer who didn't have authority to sign it. *** we're not saying Mr.***

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8 . DEA has not cited any legal authority whereby a DEA operative can lawfully replace its "Deciding Officer" (Greenlee) in order to rescind a Settlement Agreement approved by the Deciding Officer or whether Respondent Gruden, a non-lawyer, could lawfully qualify as a Deciding Officer under applicable law.

Bayless didn't have reason to think that the people he was dealing with were authorized, so we're not disputing that, , ..." (Tr. 10-11, Ap. 74a)

DEA then went to a fallback position that the Settlement Agreement is void as against "public policy", and could, therefore, be unilaterally rescinded. DEA's briefing does not specify the "public policy" but clearly wishes to re-open and re-litigate the unproven, contested and settled charges DEA relating to Doe's alleged off-duty conduct, charges emanating from a withheld affidavit of M and contradicted by her partner's affidavit, charges so sleazy and unproven that DEA agreed to withdraw and seal them after 4 months of intensive negotiations.

DEA's briefing below ignored the key point that its most senior lawyers and officials in charge of such matters painstakingly reviewed **all allegations against Doe in exhaustive detail during the course of the settlement negotiations, including all allegations of sexual misconduct, and concluded the same were without basis.** Yet, when DEA had to concede its "lack of authorization" rationale for recission was false, DEA invented the "public policy" issue as a last-ditch excuse for rescinding the Settlement Agreement, a position which speciously implies, inter alia, that its Deputy General Counsel, Mr. Gleason, and the many senior DEA lawyers and officials who reviewed the Settlement Agreement ignored public policy.

In pursuit of its newly-developed "public policy" thesis, DEA's briefs below also assert Doe "really" did not resign in order to pursue a career in commercial aviation and "thus" DEA would violate

public policy by telling potential employers that Doe had resigned to go into commercial aviation. Contradicting this attempted falsification of the record is the fact that Doe, a licensed Commercial pilot and Instructor before he joined DEA, entered the Sheffield Aeronautical School immediately after the Settlement Agreement was signed on February 4, 1998 for advanced commercial aviation training and DEA was immediately informed of his action.

DEA's "public policy" position is also completely at odds with the reference letter, Attachment A to the Complaint (Ap. 67a), which states that Doe resigned to commence a career in commercial aviation. Having slashed the honesty of its own senior lawyers and top officials who took part in negotiating the Settlement Agreement and ignoring the explicit wording of that DEA-drafted Agreement and its Attachment as well as Doe's status as a Commercial pilot and Instructor prior to joining DEA and his frustration in being unable to secure a coveted slot in the Air wing, DOJ counsel handling the case then asserted that Mr. Marshall, now Acting Director of DEA, participated in a fraud relating to the reference letter, a charge that he vigorously denied in his deposition. Indeed, the matter is so bizarre that it seems possible the Department of Justice Lawyers will seek to declare Mr. Marshall a hostile witnesses in the event this case is remanded for trial.

At the conclusion of the March 23, 1998 hearing, the district court converted Doe's Motion for a TRO to a Motion for a Preliminary Injunction, granted Doe's request to take certain DEA depositions (but refused any document requests) and ordered that any motions Doe might wish to make must be filed by April 8, 1998. Doe's counsel took

depositions of DEA officials and lawyers in Washington, DC and on April 8, 1998 duly filed motions for summary judgment and renewed Doe's motions for a TRO and a Preliminary Injunction. The district court set a hearing on those motions for Friday, March 17, 1998.

Faced with the Friday hearing, on Wednesday, April 15, 1998, Respondent Gruden faxed the "Firing Letter" (dated April 14, 1998) to Doe's counsel purporting to "fire" Doe notwithstanding his Doe's prior letters of resignation. The fax was sent without the 72-hour advance notice promised by Respondent Gruden in his letters to Doe, including that dated March 12, 1988. (Ap. 77a)[9] Nor did DEA ever explain how it could lawfully "fire" a person who had already resigned.[10]

THE DISTRICT COURT'S OPINION

On April 16, 1998, the district court dismissed the case for lack of subject matter jurisdiction, stating that "considering the materials before it, the Court finds that Count IV is Doe's attempt to constitutionalize [sic] what is in essence a breach of contract claim"

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9 . Respondent Gruden's broken promise to Doe and to the district court to provide at least 72 hours advance notice prior to any firing was a representation made to forestall a TRO and upon which Doe relied upon to his immense detriment.

10. As the record clearly shows, DEA wanted to fire Doe to tarnish his reputation. Moreover, DEA's refusal to accept Doe's two letters of resignation submitted right after the signing of the Settlement Agreement is at odds with the assurance of DEA's counsel who represented to the district court and Doe that "There's no problem with the plaintiff resigning. He has – certainly he can resign." (Tr. 18, Ap. 75a)

and "like the others is properly before the MSPB." (Opinion Ap.22a)[11]

THE COURT OF APPEALS OPINION

The Third Circuit affirmed, agreeing with the district court that Doe's claim "is best described as a breach of contract rather than a constitutional violation." (Ap. 12a) In passages eerily reminiscent of Kafka, the Third Circuit approved the district court's findings of inflammatory and highly prejudicial "facts" even though they were not in evidence and were lifted from DEA's briefs and its Firing Proposal March 11, 1998 [12]

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11 . Even though DEA failed to introduce any evidence in court or a single affidavit or other writing under oath, Judge Hutton's opinion describes at length "actions" of Doe and purported matters "admitted" by Doe, concluding that DEA acted "Given these facts". (App. 19a-20a). The "facts" recited by Judge Hutton are mere assertions derived from DEA's briefs and from the Firing Proposal, a DEA list of charges which is double hearsay.

12 . The Third Circuit also found it necessary to recite as "fact" non-record, unsupported allegations against Doe. See footnote 1. (App. 4a) The Third Circuit supported the district court 's "fact-finding" and ignored their non-evidentiary source: "The facts in the district court's memorandum relate to allegations in the complaint . . . Moreover, the allegations regarding the girl are drawn from the firing proposal that is part of the record." (App. 13a-14a) The Firing Proposal March 11, 1998 is nothing more than a list of hearsay charges, a kind of civil indictment, yet the Third Circuit, like the district court, accepted these charges as true.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT AS WELL THE DISTRICT COURT VIOLATED BELL V. HOOD, 327 U. S. 678 (1946) AND 5 U. S. C. 702 BY CONVERTING DOE'S WELL-PLEADED SUBSTANTIAL CLAIMS FOR EQUITABLE RELIEF FOR CONSTITUTIONAL VIOLATIONS INTO A "BREACH OF CONTRACT" CASE TO BE DECIDED BY THE MSPB, AN EXECUTICE BRANCH AGENCY

28 U.S.C. § 1331 provides district courts of the United States "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States". (Ap. 24a)

To avoid the statute's clear grant of federal court subject matter jurisdiction both courts below ignored Doe's claim for injunctive relief relative to the uncontroverted allegations of the Complaint which describe DEA's clearly illegal and massive violations of Doe's rights under the First and Fifth Amendments, as well as "Whistleblower" Statute, 5 U. S. C 2302(b)(8)(A), (B), (9) (10). (App. 27a, 29a-32a)

In so doing, they also failed to deal with the fact that, in 5 U. S. C 702 (Ap. 25a), Congress did not waive sovereign immunity for equitable relief "for other than money damages". This exception is explained in detail in Hubbard v. EPA, 809 F.2d 1 (D. C. Cir. 1986) and Mitchum v. Webb, 73 F. 3d 30 (3 Cir. 1995), infra, and has been acknowledged by this Court recently in Department of the Army v. Blue Fox, Inc., No. 97-1642 decided January 20, 1999.

In "downsizing" Doe's constitutional claims, moreover, the courts below clearly violated Bell v. Hood, 327 U.S. 678, 681-82 (1946), which ruled a district court has no power to recharacterize a constitutional claim as "really" a state law claim in order to defeat federal question jurisdiction [13]

The punitive and deceitful action of DEA and its clear intent to ruin Doe for joining with Special Agent Sterling in reporting what, in effect, was a theft by local Cleveland area police of a large portion of $260,000 in 1995 and then for exposing its gross mismanagement of its super-secret Newington facility, its trampling of his First and Fifth Amendment rights, its unjustifiable refusal to permit Doe to resign –as if he were in servitude, the bizarre and lawless fashion by which it "rescinded" the Settlement Agreement and then fired him

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13 . "Whether or not the complaint as drafted states a common law action in trespass made actionable by state law, it is clear from the way it was drawn that petitioners seek recovery squarely on the ground that respondents violated the Fourth and Fifth Amendments. It cannot be doubted therefore that it was the pleaders' purpose to make violation of this Constitutional provisions the basis of this suit. Before deciding that there is no jurisdiction, the district court must look to the way the complaint is drawn so as to claim a right to recover under the Constitution and laws of the United States." (Bell at 681-682) By contrast, the Third Circuit ignored the uncontroverted allegations of outrageous Constitutional violations set forth in detail in the Complaint and admissions of DEA witnesses under oath and, instead accused Doe of seeking "to circumvent the Civil Service Reform Act's administrative scheme" (App. 8a)

after he resigned, all as described and not controverted, cannot be reduced to a de minimis non-federal claim of a "breach" of a contract. In such circumstances, federal courts have subject matter jurisdiction.

Indeed, as the Third Circuit stated in Mitchum v. Webb, 73 F. 3d 30, 35 (3 Cir. 1995) the "power of federal courts to grant equitable relief for constitutional violations has long been established" citing Osborn v. United States Bank, 22 U.S. 738, 838-46 (1824); Ex parte Young, 209 U.S. 123, 156 (1908); See also Bell v. Hood, 327 U.S. 678, 684 (1946): ("[I] t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.").

For purposes of reviewing the dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(1), the district court must accept the factual allegations in a complaint as true. See Wright & Miller, Federal Practice And Procedure: Civil, § 1350 (2d ed. 1990) at pages 218-219. There are two types of attacks on subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1): "facial" (claiming jurisdiction was not properly pled) and "factual" (claiming that jurisdiction does not actually exist). See Young v. Francis, 820 F. Supp. 940 (E.D. Pa. 1993); Holt v. United States, 46 F.3d 1000 (10th Cir. 1995); Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884 (3d Cir. 1977). Here, DEA failed to articulate the type of attack it made under Rule 12(b)(1). However, like Young, DEA never answered the Complaint or introduced into evidence any facts to dispute the allegations of the Complaint.

Thus, DEA's position, which was adopted by the courts below,

rests wholly on the "legal" argument that the Complaint "really" only claims a "breach of contract" .DEA's position under Rule 12(b)(1) was thus "facial". However, when presented with a "facial" attack, the cases make it clear that the law offers safeguards which are similar to F.R.C.P. 12(b)(6): "the court must consider the allegations of the complaint as true." Mortensen, 549 F.2d at 891. And see Bell v. Hood, 327 U.S. 678, 681 (1946), emphasizing held that the plaintiff controls his pleading with respect to whether the suit "arises under" the Constitution.

As described at page 16-17, infra, and elsewhere herein, Doe's complaint alleges specific, manifold acts by which DEA deprived Doe of crucial, substantial constitutional rights, including:

1. Unlawful "taking" of the Settlement Agreement, a valid contract and a Fifth Amendment Property Right of Doe's.

2. Respondent Gruden's firing Doe based upon unproven hearsay and withheld allegations in the Firing Proposal March 11, 1998.

3. That DEA maliciously deprived Doe of his property, reputation and liberty without due process of law.

4. In Count IV, Doe explicitly seeks to "enjoin DEA from rescinding the Settlement Agreement and further issuing a Declaratory Judgment . . . that [Doe's] Fifth Amendment and Due Process Rights have been and will be violated by resurrecting the Firing Proposal and permitting it to be decided by [Respondent] Gruden." (Complaint ¶28, Ap. 27-28).

5. Count V details Doe's exercise of his First Amendment speech rights and alleges in paragraph 51-53 that the rescission of the Settlement Agreement and the predicted firing were in "retaliation for

" Doe's 'Whistleblowing' actions, including disclosing the gross mismanagement by DEA at [SOD-Newington] to Congress and OSC." (Complaint, ¶50, Ap. 38).

Thus, Doe could not have been clearer in alleging that DEA's illegal rescission of the Settlement Agreement and subsequent firing was in retaliation for his exercise of his First and Fifth Amendment rights.

Taken as a whole, the Complaint alleges that the Settlement Agreement hammered out over four months of negotiations was designed to protect Doe's valuable employment rights, as well as providing elaborate safeguards of his privacy and reputation ---clear First and Fifth Amendment rights. Doe's claims thus "arise under" the Constitution and the Third Circuit's affirmance of the district court's dismissal of the complaint **"with prejudice"** were wrong. Both courts below failed to read and construe the complaint as required by Bell v. Hood.

The Third Circuit mistakenly upheld the district court's finding of lack of subject matter jurisdiction on the basis of damage cases, such as Bush v. Lucas, 462 U.S. 367 (1983 [damages against Federal employees personally, but no request for injunctive relief], United States v. Fausto, 484 U. S. 439 (1988) [Federal employee suing under the Backpay Act] and Schweiker v. Chilicky, 487 U. S. 412 (1988) [damages for denial of social Security benefits].

However, 5 U. S. C. 702 (App. 28a) of the Civil Service Reform Act ["CSRA"]. Expressly permits a "person", including a federal employee, from seeking non-monetary equitable relief and a declaratory judgment in federal court with respect to constitutional

violations by federal agencies. See Department of the Army v. Blue Fox , Inc., supra. Thus, in Mitchum v. Webb, 73 F. 3d 30, 36 (3 Cir. 1995)), the Third Circuit held:

"We therefore hold that Bush and the related Supreme Court decisions on which we rely did not prevent the district court from entertaining the employees' requests for injunctive relief. Nor do we interpret these precedents as limiting the district court's authority to award declaratory relief under 28 U. S. C. 2201-02." [Emphasis supplied.]

Mitchum followed Hubbard v. EPA, 809 F.2d 1, 11 (D.C. Cir. 1986), a decision joined by Justice Scalia when he was a judge of the Court of Appeals for the District of Columbia. Hubbard, a Narcotics Detective, sought damages and injunctive relief for violation of his First Amendment rights, alleging he had been turned down for federal employment based upon the exercise of his First Amendment rights by speaking to the media. The Hubbard Court explained that Bush:

"only precludes damage claims against individuals, not equitable claims against agencies . . . federal courts have jurisdiction to grant equitable relief to remedy agency violations of constitutional rights." ***Because 5 U. S. C. 702 waives sovereign immunity from suits not seeking money damages, federal courts have jurisdiction to grant equitable relief to remedy agency violations of constitutional rights." (Citations omitted, emphasis supplied) "Reinstatement clearly is among those equitable remedies available to Hubbard. Hubbard is therefore entitled to reinstatement ... if he can show that EPA's rejection of his job Application violated his first amendment

rights." (809 F. 2d at 11) [14]

There is thus no CSRA "scheme" which preempts the equitable power of federal courts to enjoin "runaway" federal agencies from arbitrarily firing employees and disseminating defamatory, career-destroying allegations to ruin them. See McVeigh v. Cohen, 983 F. Supp. 215 (D. C. D. C. 1996).[15]

The Third Circuit in the present case should have taken the uncontroverted allegations of Doe's complaint as true---as written--- under Bell v. Hood and followed the equitable relief holdings under 5 U. S. C 702 per Mitchum, Hubbard, and McVeigh.

Both courts below also failed to recognize that the Court in Bush and Fausto did not address subject matter jurisdiction at all. Indeed, the Court in Bush explicitly acknowledged that the district court had jurisdiction. (462 U. S. at 378) Numerous courts have since recognized that Bush falls within the rubric of F. R. C. P. 12(b)(6) failure to state a claim and does not involve subject matter jurisdiction under Rule 12(b)(1) See, e.g., Lee v. Hughes, 1998 U.S. Ap. LEXIS 16045, at *16 n.6 (11th Cir. July 9, 1998); Janicki Logging Co. v. Mateer, 42 F.3d 561, 563-64 (9th Cir. 1994). Lee and Janicki explain

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14 . 5 U. S. C 702 is reproduced in the Appendix at Ap. 3.

15 . "Without this Court's immediate intervention, the plaintiff will lose his job, income, pension, health and life insurance, and all the other benefits attendant with being a naval officer. Having served honorably for the last seventeen years, plaintiff will be separated from a position which is central to his life on the sole ground he has been labeled a "homosexual". The stigma that attaches to such an accusation without substantiation is significant enough that this Court believes it must grant the injunctive relief sought".

that district courts clearly have subject matter jurisdiction over claims of constitutional violations.

II. DEA's RECISSION OF THE SETTLEMENT AGREEMENT WAS AN UNCONSTITUTIONAL TAKING OF DOE'S FIFTH AMENDMENT PROPERTY

Doe's Complaint alleges that DEA's rescission of its Settlement Agreement with him was a "taking" without compensation in violation of his Fifth Amendment Right to compensation. The Third Circuit's opinion, as noted, violates the Bell v. Hood rule by ignoring the explicit constitutional claims, and further belittles them as not being "genuine", as well as "vague" and "ill-defined" and which fail "even to identify a protected property or liberty interest to invoke the Constitution' and concludes that DEA's recission of the Settlement Agreement with Doe as "best described as a breach of contract".

Aside from ignoring the clear constitutional claims in Doe's Complaint, the Third Circuit's holding also misses the obvious point that recission is the termination of a contract, so that, once such termination occurs, there is no contract in being to be breached.

Of course, contracts made with the United States are "Property" for purposes of the Fifth Amendment. "Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. United States v. Central Pacific R. CO., 118 U. S. 23 5, 23 8. " Lynch v. United States, 292 U. S. 571, 579 (1934). And see United States v. Lee, 106 U. S. 196, 217 (1882) Intangible property, including private and proprietary information, is similarly protected

from Taking in violation of the Fifth Amendment. Ruckleshaus v. Monsanto, 467 U. S. 986 467 U. S. 986, 1002 (1984).

The unilateral termination of a Settlement Agreement with an agency of the United States is a deprivation of rights under the due process clause of the Fifth Amendment. See Uniroyal Inc. v. Uniroyal-Marshall, Secretary Of Department Of Labor, 14 Empl. Prac. Dec. (CCH) P7672, 1977 U. S. Dist. Lexis 15306 (N. D. Ind. 1977). Nor can DEA justify its recission of its Settlement Agreement because it subsequently decided it would be disadvantageous to it. Worthy v. McKesson Corporation, 756 F. 2d 1370, 1372-1373 (8 Cir. 1985). Indeed, general principals of agency law require DEA to honor Settlement Agreements. Ramallo v. Reno, 931 F. Supp. 884, 892 (D. C. D. C. 1996).

Furthermore, on demand by DEA, Doe released DEA from all claims and agreed to withdraw all administrative and judicial claims in the Settlement Agreement. Doe was thus "suckered" into releasing DEA and when he had done so, DEA rescinded the Settlement Agreement. (Applicable limitations rules may well bar Doe from filing with the MSPB.) DEA knew had it had no facts to justify any disciplinary action against him. DEA nevertheless still needed a way to get him drop his "Whistleblowing" claims before the OSC and, more dangerously, before Congressional committee(s) in order to get agent Fiano (and any possible DEA cohorts) off the hook for gross mismanagement at Newington, DEA's most secret and politically sensitive facility in the 'war' on drugs.

Doe, in turn, simply wanted to pursue his objective of becoming a full-time commercial pilot, so he signed the Settlement

Agreement in good faith and immediately changed his personal and economic positions in reliance upon it, entering into a multi-thousand dollar commercial aviation training school within two weeks after the Settlement Agreement was signed. As such, having offered the inducement, DEA is bound. Santobello v. New York, 404 U. S. 257, 262 (197 1).

III. THE THIRD CIRCUIT ERRONEOUSLY HELD DOE FAILED TO ASSERT "GENUINE" FIFTH AMENDMENT DUE PROCESS CLAIMS UNDER THE FIFTH AMENDMENT

Doe's complaint clearly pleads violations of his the Fifth Amendment procedural and substantive due process rights. The Third Circuit ignored Doe's procedural and substantive due process claims despite ample evidence of extraordinary procedural abuses by DEA which are set forth amply in the complaint and summarized above at pages 16-18 above.

The gross mangling of procedural due process is evident, including withholding the allegedly key "M" affidavit, threatening Doe and his counsel with criminal prosecution if either tried to interview the "accuser" and a recission so falsely grounded that DEA's counsel was forced to withdraw it in open court. In short, DEA's outrageous behavior meets the test of the Third Circuit opinion (Ap. 12a) that the deprivation must have taken place in a manner such as to "shock the conscience".

Further, if being free from a federal agency disseminating defamatory and unproven allegations of sexual misconduct is not a "cognizable" liberty and property interest, one must ask what more

damaging allegations are needed to state a substantive due process claim. Indeed, the recission of crucially important contractual rights by a bureaucracy management intent upon covering its serious wrongdoing by discrediting the reputation of a star agent and firing on a pretext is deprivation "of life, liberty or property" (Third Circuit Opinion, Ap. 123a).

Advising potential employers that Doe was fired for "sexual misconduct", even though not proven, obviously renders Doe essentially unemployable. Armintrout, Doe's employment practices expert with many years of expertise, concludes "a terminated Federal Law Enforcement Agent would have essentially no prospects of ever being hired for a position of responsibility by any employer of stature." (Affidavit of Edward Armintrout, Complaint Exhibit C, ¶12 at App. 73a)

Further, when Doe's counsel informed the district court of DEA's outrageous threats to initiate criminal action if Doe and his Attorney interviewed the supposed accuser, "M", the district court ruled that M could be interviewed. However, a DEA agent called the accuser's home before Doe's Licensed Private Investigators arrived. . Whatever what was specifically said by DEA agent in that call is unknown at this time, but when Doe's licensed private investigators arrived, the woman who answered the door became hysterical and demanded they leave stating that the federal agent who took her daughter's affidavit had called to "warn" her. (Loparo Declaration, App. 80a-81a) [16]

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16 . Based on the Loparo affidavit, the DEA Agent who made the intimidating call which thus prevented any interviews of "M", was Tony Placido, another veteran DEA operative who was promoted not long after finishing his role in

In short, DEA's actions have been "shocking" and "contrary to accepted notions of ordered liberty"—and substantive due process.

IV. THE THIRD CIRCUIT ERRED BY FAILING TO REVIEW DOE'S FIRST AMENDMENT CLAIMS IN AFFIRMING THAT THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION

In its Opinion, the Third Circuit ignored the failure of the district court to rule on Doe's First Amendment claims and did not analyze the allegations of the complaint which asserts, inter alia, that DEA violated the "Whistleblower" Act 5 U. S. C. 2302, (Ap. 27a-29a), which protects federal employee's First Amendment Speech Rights by prohibiting an employee from being fired or from other reprisal for speaking out and reporting gross mismanagement, fraud, waste and the like. 5 U. S. C. 2302 (b). Moreover, the burden of showing justification for an adverse personnel action following "Whistleblowing" is upon the federal agency to show the firing was not a prohibited reprisal, See Marano v. Department Of Justice, 2 F. 3d 1137, 1140-1141 (Fed. Cir. 1993).

This case involves violations of First Amendment Speech Rights no less serious as those pleaded in Mtchum. Indeed, at page 8 of the opinion below, the Third Circuit concedes that, in Mitchum:

> "The Mitchum employees of a Veterans Administration Medical Center--claimed that DEA administrators violated their First Amendment rights by imposing retaliatory measures because of

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Doe's case and is now a Country Attaché in South America, a much coveted posting.

their protected Whistleblowing speech. We permitted the employees to seek injunctive and declaratory relief for their claims in a district court without exhausting administrative remedies. The Mitchum panel held that the Civil Service Reform Act does not affect the traditional power to enjoin unconstitutional acts by the government." [Emphasis supplied.]

V. THE MERIT SERVICE PROTECTION BOARD DOES NOT QUALIFY AS AN ARTICLE III COURT AND THUS CANNOT HEAR PETITIONER'S CONSTITUTIONAL CLAIMS

The courts below held federal employees like Doe who seek injunctive and declaratory relief for constitutional violations by federal agencies must do so before the Merit Service Protection Board (MSPB). However, there is no statutory basis for a such a "scheme" in the CSRA and, as discussed, the holding clearly is wrong in view of the non-waiver provision of 5 U. S. C 702. (App. 25a) Moreover, even if such a statutory "scheme" existed in the CSRA, the operative provisions would be unconstitutional because MSPB does not conform to Article III. See Northern Pipeline Co. v. Marathon PipeLine Co., 458 U. U. 50 (1982) where this Court invalidated the legislation which established the Bankruptcy courts.[17]

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17. MSPB members lack any of the protections afforded the Article III Judiciary, as is plainly evident from 5 U. S. C 1201. (Ap. 2). As such, the MSPB is only a quasi "judicial" arm of the Executive Branch, plainly devoid of the Article III powers to hear Doe's constitutional claims. Indeed, the CSRA provides in 5 U. S. C 1201 (Ap. 26a) that the MSPB is composed of three members Appointed by the President, with Senate advice and consent.

CONCLUSION

The Third Circuit committed reversible error in affirming the district court's characterization of the Complaint as a mere "breach of contract" case in direct violation of Bell v. Hood, 327 U.S. 678 (1946). The district court clearly had subject matter jurisdiction over Doe's Complaint for equitable relief to prevent violations of his constitutional rights.

This case represents what has become a crucial issue in American governance. It is an unpleasant fact of life that persons in high office and their cohorts engage in wrongful acts. In governmental agencies a "Look The Other Way" philosophy has become ingrained, an attitude quite understandable because federal employees who do render candid reports to oversight bodies are so often hunted down and fired. Retaliation for reporting wrongdoing is so much the rule that federal employees often ask to testify about their agency's conduct from behind screens using devices to alter their voices to hide their identity, the same system used in organized crime cases. The consequential distrust of the federal government by ordinary citizens is

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However, that section includes limits as to the political affiliation of the members, a confine which itself would not pass muster under Article III. Members can also hold other federal office(s), the term is 7 years (5 U. S. C 1202) , removal is possible by the president for vague infractions including "inefficiency" or "neglect" Compensation of the members is not stated, nor is there any provision prohibiting reduction of compensation. Sections 5 U. S. C 702 (Ap 25a) and 7703 (Ap. 30a-31a) provide for judicial review of MSPB decisions, but no de novo hearing by a n Article III federal court.

widespread, obvious and understandable.

The Founders were painfully aware of the consequences of consigning dissidents to the "King's Men" to adjudicate their destiny. The consequences to those who offended offend the monarch were certain. In operative practice, latter day "administrative boards" under the Executive Branch are hardly different. Indeed, they reduce federal dockets, but the practice dangerously erodes Article III 's promised protection of an independent federal judiciary.

This case is no "routine federal employment matter". It seeks an answer to the question of whether otherwise carefully guarded Constitutional Speech and Property Rights of federal employees will be protected by Article III courts for reporting wrongdoing.

Doe and Sterling knew they were risking their careers in reporting the illegal cash seizure in Cleveland in 1995. Moreover, late in January 1998, when Doe authorized delivery of the Newington Report to the OSC and Congressman Weldon, Doe knew he was risking a Settlement Agreement about to be signed, an Agreement which cleared his name and required DEA to seal the McCarthyite trash DEA has used to disparage him, yet refuses to produce. So fearful was DEA that its agent called "M" 's mother to "warn" M. Not to talk?

Newington was designed to be the key intelligence center in the "war" against drugs, yet it was and is a scandalous mess. As the new Acting Administrator has acknowledged, DEA is searching for a secure site. Doe's contribution clearly has been to force that decision. He deserves a commendation, not DEA's scurrilous, baseless attacks and irritable lower court opinions mandating that he bankrupt himself

by going through a trial before men from the same branch of government which fired him for doing what was morally right.

The courts below engaged in subjective and demeaning characterizations of Doe's blunt Complaint, twisting and weaving through Rule 12 (b)(1) to dodge Doe's constitutional claims.

Doe spoke out and reported serious—and admitted—wrongdoing in America's most powerful internal police force. For his efforts, he has been deprived of his property in the form of the Settlement Agreement, cannot obtain a reference from DEA and is thus essentially unemployable. Unless this Court overturns the Third Circuit's decision, Doe has no realistic chance of being employed as a commercial pilot or obtaining any other job of substance—for life.

The petition for certorari should be granted.

Respectfully submitted,

/s/ John Doe

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Pro Se

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1356

JOHN DOE,

Appellant,

vs.

THOMAS CONSTANTINE, Administrator Drug Enforcement Agency, and PETER F. GRUNDEN, Special Agent

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 98-cv-01238)
(District Judge: Honorable Herbert J. Hutton)

ARGUED JANUARY 15, 1999

BEFORE: NYGAARD, ALITO, and LEWIS, Circuit Judges.

(Filed May21, 1999)

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OPINION OF THE COURT

LEWIS, Circuit Judge:

John Doe, a former employee of the United States Drug Enforcement Administration ("DEA"), brought an action against the DEA in the United States District Court for the Eastern District of Pennsylvania to enforce a settlement agreement. Doe sought injunctive and declaratory relief, along with actual and punitive damages, on both statutory and constitutional grounds. Specifically, Doe attacked the DEA's refusal to abide by the terms of a negotiated agreement that settled their employment dispute. The District Court dismissed Doe's complaint against Thomas Constantine, administrator of the DEA, and Special Agent Peter Gruden for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). For the following reasons, we will affirm the judgment of the District Court.

I.

Doe served as a special agent in the DEA from 1991 to 1998. In September 1996, the DEA transferred Doe from a field office to the Special Operations Division ("SOD"). As a result of the reassignment, the DEA required that Doe undergo a security upgrade review. However, for reasons not made clear in the

record, Doe began working in the SOD before the upgrade review was complete.

During the ensuing security background check, Investigators learned of an allegation of inappropriate sexual behavior involving Doe and a teenage neighbor that occurred during the summer of 1993.[1] The DEA investigators referred the matter to the Office of Professional Responsibility which, in turn, issued a letter in October 1995 proposing Doe's dismissal for violating the DEA's standards of conduct that prohibit "engaging in any criminal, infamous, dishonest, or notoriously disgraceful conduct or other conduct prejudicial to DEA, to the Department of Justice, or to the government of the United States." Appendix ("App.") at 284-285. Doe, however, disputes

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[1]. According to the DEA, Doe admitted to investigators that on approximately 20 occasions he had masturbated in his bedroom window in plain view of a thirteen-year-old girl and her friends, located in the house next door. On one occasion, the girl's family contacted the police when Doe allegedly stood naked in his window and called for the girl because he wanted to see her. In 1996, the girl, then sixteen, reported that Doe began writing sexually explicit letters to her expressing a desire to pursue a romantic relationship.

many of the details regarding his alleged conduct. In fact, he denies both the facts of the allegations and that he made any admissions regarding the conduct described by the investigators.

Following receipt of the October letter, Doe retained counsel to challenge the DEA's proposed personnel action. Doe's lawyers eventually negotiated a settlement agreement with the DEA's Office of Chief Counsel. Under the negotiated settlement, Doe resigned his position in exchange for the DEA's promise to keep the circumstances of his exit confidential. The DEA also agreed to inform potential private sector employers that Doe resigned voluntarily, with no mention of the investigation, however, if law enforcement or intelligence entities were to inquire, the DEA agreed to mention only that Doe resigned at the conclusion of an internal investigation but that he had vigorously denied any wrongdoing. At the close of negotiations, the agreement was executed on February 4, 1998 by Doe's attorney and Charles Walden, the DEA's associate chief counsel for administrative law.

While the settlement negotiations were underway, Doe contacted the U.S. Department of Justice's Office of the Special Counsel and the chairman of a U.S. House of Representatives Armed Services subcommittee to allege security violations, misconduct and mismanagement in the SOD. As a direct result of Doe's charges, which were forwarded to Administrator Constantine,

the subcommittee chairman urged an immediate investigation into the allegations.

On approximately February 20, Gruden, then acting deputy administrator of the DEA, rescinded the negotiated settlement agreement on behalf of the DEA. In addition to the recission, Gruden informed Doe that the DEA would not acknowledge his resignation pursuant to the agreement and would instead terminate him under ordinary personnel procedures. Doe suggests that Gruden's action be in retaliation to his protected whistleblowing activities.

Doe filed a complaint and motion for a temporary restraining order in the District Court. Doe sought: (1) actual and punitive damages for breach of contract; (2) a declaratory judgment that his settlement agreement is enforceable; (3) an injunction preventing the DEA from rescinding the settlement agreement due to failure to comply with 5 U.S.C. § 2302; and (4) an injunction preventing the DEA from rescinding the settlement agreement due to his "Fifth Amendment and due process rights." Finally, Doe alleged that the DEA's conduct violated the Whistleblower Protection Act, 5 U.S.C. §§ 2302(b)(8) and (9)(V).

The District Court found that Doe's claims alleged a breach of contract, not a constitutional violation, and dismissed the

complaint for lack of subject matter jurisdiction. This appeal followed.

II.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. Since the grant of a motion to dismiss for lack of subject matter jurisdiction is subject to plenary review, see FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 839-40 (3d Cir. 1996), we must independently decide whether Doe's claims are preempted by the Civil Service Reform Act, Pub.L. 95-454 (codified at various sections of Title 5 U.S.C.), and barred from being heard in federal district court without an exhaustion of
administrative remedies.

A. Civil Service Reform Act Preemption

Congress enacted the Civil Service Reform Act to provide an administrative framework to handle personnel disputes for federal government employees. Unquestionably, the Civil Service Reform Act legislative scheme provides federal government employees with their primary vehicle for relief in personnel matters. The Civil Service Reform Act mandates that an employee must await final agency action on the personnel matter in dispute. The then employee has a right of administrative appeal to the Merit Systems Protection Board. See 5 U.S.C. §§ 7512, 7701.

Rather than take his claims to the Merits Systems Protection Board, Doe filed suit in federal district court. Thus, Doe has sought to circumvent the Civil Service Reform Act's administrative scheme. Doe argues that he is permritted to do so. We will examine that argument in the context of the prevailing case law.

In Bush v. Lucas, 462 U.S.367 (1983), a federal employee who contended that he had been suspended in retaliation for whistleblowing sought damages and attorney's fees in a Bivens action.[2] The Supreme Court, however, declined to create the "new judicial remedy" he sought. Bush, 462 U.S. at 368. The Court determined that Congress's development of the "comprehensive procedural and substantive provisions" of the Civil Service Reform Act counseled hesitation in permitting alternative remedies. Bush, 462 U.S. at 368.

Later, in United States v. Fausto, 484 U.S. 439 (1988), the Court pointed to the comprehensive nature of the Civil Service Reform Act in holding that a federal employee could not bypass the administrative apparatus by seeking back pay under the Back

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[2] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392-391 (1971) (recognizing an implied private right of action for federal violations of an individual's constitutional rights).

Pay Act, 5 U.S.C. § 5596, in federal district court. The Supreme Court firmly established the Civil Service Reform Act and the Merit Systems Protection Board as the primary means to adjudicate personnel matters. Finally, in Schweiker v. Chilicky, 487 U.S. 412 (1988), the Court relied on Bush in declining to recognize a damages claim for the unconstitutional denial of Social Security disability benefits. The Court noted that "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies." Schweiker, 487 U.S. at 423.

Thus, as this trio of cases makes clear, a federal employee who has meaningful administrative remedies under the Civil Service Reform Act or any comparable scheme may not bypass that scheme at will. As Doe correctly notes,
however, we have adopted a narrow exception to this general rule, one which permits an employee seeking injunctive relief on a constitutional claim to proceed in a district court. See Mitchum v. Hurt, 73 F.3d 30 (3d Cir. 1995); see also Hubbard v. EPA, 809 F.2d 1 (D.C. Cir. 1986). At issue here is whether Doe's claim falls under the Mitchum exception.

B. The Mitchum Exception

In Mitchum, we carved a narrow exception to the general rule that employment disputes remain the exclusive jurisdiction of the

Merit Systems Protection Board pursuant to the Civil Service Reform Act. The Mitchum plaintiffs -- employees of a Veterans Administration Medical Center -- claimed that government administrators violated their First Amendment rights by imposing retaliatory measures because of their protected whistleblowing speech. We permitted the employees to seek injunctive and declaratory relief for their claims in a district court without exhausting administrative remedies. The Mitchum panel held that the Civil Service Reform Act does not affect a court's traditional power to enjoin unconstitutional acts by the government. See Mitchum, 73 F.3d at 35 ("The power of the federal courts to grant equitable relief for constitutional violations has long been established.").

Doe relies heavily on Mitchum in arguing that because his complaint alleges that Constantine and Gruden's actions violated his Fifth Amendment due process rights, they may be heard in federal court. Doe argues further that the District Court overstepped its bounds by reframing his Fifth Amendment violation as a breach of contract claim. We disagree. While it is true that Doe invokes the words "Fifth Amendment" in his complaint, see App. at 15a ("Plaintiff's Fifth Amendment and Due Process Rights have been and will be violated ...."), Doe has not pleaded the type of genuine constitutional claim which would activate the application of Mitchum. See Mitchum, 73 F.3d at 35 (noting "the right of civil servants to seek equitable relief against their supervisors and the agency itself in

vindication of their constitutional rights" in federal court despite the Civil Service Reform Act) (quoting Hubbard, 809 F.2d at 11).

The mere assertion of a vague, ill-defined constitutional violation is simply not enough to support jurisdiction under Mitchum. See Bell v. Hood, 327 U.S. 678, 86283 (1946) (an alleged claim under the Constitution may be dismissed if "made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous"). Doe has alleged a Fifth Amendment violation; thus, he must demonstrate a deprivation of life, liberty or property. However, in his complaint, Doe has failed even to identify a protected property or liberty interest to invoke the Constitution. We do not believe that Doe's settlement agreement provides an adequate constitutional property or liberty interest. Although the agreement, if valid, [3] may impose some obligations on the DEA, the mere existence of an agreement does not confer a dispositive constitutionally protected property interest.[4] See. e.g., Reich v.

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[3]. The parties have adopted differing positions on the enforceability of the agreement; we decline to express any opinion on the validity of the agreement or its terms.

[4] Generally, contract rights are only recognized as constitutionally protected property in rare cases. For example, where "the contract confers a protected status, such as those characterized by a quality of either extreme dependence in the case of welfare benefits, or permanence in the case of tenure, or sometimes both." See Uncer v. National Residents

Beharry, 883 F.2d 239, 242 (3d Cir. 1989) ("Every breach of contract by someone acting under color of state law [does not] constitute[] a deprivation of property for procedural due process purposes."); Sudeikis v. Chicago Transit Authority, 774 F.2d 766, 770 (7th Cir. 1985) ("It has long been settled that a mere breach of contract by the government does not give rise to a constitutional claim."); Jimenez v. Almodovar, 650 F.2d 363, 370 (lst Cir. 1981) ("A mere breach of contractual right is not a deprivation of property without constitutional due process of law .... Otherwise virtually every controversy involving an alleged breach of contract by a government or a governmental institution or agency or instrumentality would be a constitutional case.").

At oral argument, Doe stressed that his substantive due process rights were violated by the DEA's recission of the settlement agreement. The concept of "substantive due process" forbids the government from depriving a person of life, liberty, or property in such a way that "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty." United States v. Salerno, 481 U.S. 739, 746 (1987) (citations omitted). However, to establish a substantive due process claim, a plaintiff must still show a government deprivation of life, liberty or property. See Sameric Corp. of Delaware Inc. v. City of Philadelphia, 142 F.3d

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Matching Program, 928 F.2d 1392, 1399 (3d Cir. 1991) (citations omitted). Those rare circumstances are not present in this case.

582, 590 (3d Cir. 1998) ("To establish a substantive due process claim, a plaintiff must prove that it was deprived of a protected property interest . . ."). Once again, Doe has asserted no cognizable property or liberty interest.

To summarize, we do not believe Doe has clearly presented a substantial constitutional claim under the Fifth Amendment. As such, we agree with the District Court's determination that Doe's claim is best described as a breach of contract rather than a constitutional violation. Without a constitutional claim, Doe may not use Mitchum to support jurisdiction. Accordingly, we will affirm the District Court, and the case will be dismissed for lack of subject matter jurisdiction because of a failure to exhaust administrative remedies.[5]

Finally, Doe has asked us to strike the factual background of the District Court's April 16, 1998 opinion. Doe argues that the District Court could not make "findings of fact" and that by

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5. The District Court also properly declined to extend mandamus jurisdiction, jurisdiction "can be invoked only when the plaintiff has a clear right to the relief sought, the defendant has a clear duty to perform, and no other adequate remedy is available." Blaney v. United States, 34 F.3d 509, 513 (7th Cir. 1994) (citations omitted). Doe has not satisfied these requirements. See also Bobula v. United States Dep't of Justice, 970 F.2d 854, 860 (Fed.Cir. 1992) (holding that "§ 1361 cannot provide jurisdiction where the duty alleged is merely a contractual duty unsupported by the Constitution, a statute, or a regulation").

writing a factual background it has "adopted the ugly, unsupported and unproven allegations" copied from the DEA memorandum. Appellant's Br. at 41. Doe also contends that these facts were irrelevant or unnecessary for an opinion on subject matter jurisdiction.

We find no reason to honor Doe's extraordinary request. Doe cites no authority to support striking the factual section of the District Court's opinion. The facts in the District Court's memorandum opinion relate to the allegations in the complaint and Doe's employment relationship with the DEA. Moreover, the allegations regarding the teenaged girl are drawn from the firing proposal that is a part of the record. Parties may disagree with or dispute certain facts, but that alone does not mandate that we rewrite the District Court's opinion. Although the District Court ruled on a jurisdictional matter, the context and background of the case is clearly relevant.

IV.

For the foregoing reasons, we will affirm the District Court's order granting the motion to dismiss for lack of subject matter jurisdiction.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Samuel A. Alito

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 98-1356

JOHN DOE,
Appellant

vs.

THOMAS CONSTANIINE, Administrator Drug Enforcement Agency, and PETER F. GRVNDEN, Special Agent

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANLA

(D.C. Civil No. 98-cv-01238)
(District Judge: Honorable Herbert J. Hutton)

Present:

JUDGMENT

This cause came on to be heard on the record hom the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on January 15, 1999.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered April 16, 1 99Y, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:/CLERK
Dated: May 21, 1999
3cjud

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DOE : CIVIL ACTION
v. : **UNDER SEAL**

THOMAS CONSTANTINE, et al.: NO. 98-1238

MEMORANDUM AND FINAL JUDGMENT

HUTTON, J. April 16, 1998

Presently before the Court are the Plaintiff's Motion for a Temporary Restraining Order and the Federal Defendants' Omnibus Response thereto. In addition, the Court has heard the parties' arguments at a Temporary Restraining Order/Preliminary Injunction hearing held on March 23, 1998. For the reasons that follow, the Federal Defendants' motion to dismiss for lack of
subject matter jurisdiction is granted.

I. BACKGROUND

Plaintiff John Doe was a Special Agent in the Federal Drug Enforcement Agency (DEA) between the years of 1991 and 1998. On September 29, 1996, the DEA assigned Doe to a project within the agency so secret that Doe only identifies it as

the "X Group." As a result of the re-assignment, Doe had to undergo a security upgrade from Top Secret to SCI. In the course of the agency's security review, investigators unearthed evidence that during the summer of 1993, while stationed in Ohio, Doe engaged in inappropriate sexual conduct involving thirteen year old girls.

Doe admitted to investigators that on at least twenty occasions he had masturbated in his bedroom window in view of a thirteen year old girl and her friends in the house next door. Doe would get the girls' attention by flashing his lights or throwing things from his bedroom window to theirs. On one occasion, the family of the neighboring girl called the police when Doe allegedly stood naked in his window and called one of the girls to his house because he wanted to see her. In 1996, after moving from the area, Doe began writing sexually explicit letters to his former neighbor--then sixteen--expressing an interest in pursuing a relationship with her. Finally, during the summer of 1996, Doe gave the girl the impression that he was stalking her. Doe called her workplace and, when her supervisor said she was busy, told the supervisor to tell her that she left the lights on in her car. When the girl checked her car, she found that the lights were not on, but that Doe had left another amorous card for her on the windshield.

Given these facts, the DEA referred the matter to its Office of Professional Responsibility, and on October 15, 1997, Board of Professional Conduct Chairman Thomas Kukara issued letter proposing Doe's removal for violating DEA's standards of

conduct, which prohibit "engaging in any criminal, infamous, dishonest, or notoriously disgraceful conduct or other conduct prejudicial to DEA, to the Department of Justice, or to the government of the United States." Appendix (App.") at 284-285.

Between the date of the proposed removal letter and February 4, 1997, Doe's lawyers negotiated a Settlement Agreement

With the lawyers in the DEA's Office of Chief Counsel that would allow Doe to resign from his position and require the DEA to keep the circumstances of his exit entirely confidential. Under the Settlement Agreement, **DEA agreed to maintain the fiction that Doe resigned voluntarily to pursue a career in commercial aviation.** On February 4, 1997, Doe's attorney Herman T Bayless and Charles Walden, the DEA's Associate Chief Counsel for Administrative Law, executed the Settlement Agreement. However, on February 23, 1997, DEA Special Agent Peter Gruden wrote Doe to notify him that the DEA was rescinding the Settlement Agreement, and that DEA would maintain confidentiality only to the extent to which it was required under the Privacy Act. Gruden stated that the DEA would not acknowledge Doe's tender of resignation pursuant to the Settlement Agreement, and would instead terminate under the ordinary procedures.

During the period that the attorneys negotiated the Settlement Agreement, Doe contacted the Department of Justice's

Office of the Special Counsel and members of Congress charged with oversight of the DEA to notify them of concerns he had about conduct affecting the security of the X Group facility. In his Complaint, Doe charges--among other things--that the DEA's attempt to rescind the Settlement Agreement was in retaliation for these whistleblowing activities.

On March 9, 1998, Doe filed his Complaint and Motion for Temporary Restraining Order to prevent the DEA from terminating him and to specifically enforce the terms of the Settlement Agreement. In Count I, Doe seeks actual and punitive damages for breach of contract, "equitable relief which is incidental and collateral to Plaintiff's claim for money damages", and a declaratory judgment that the Settlement Agreement is enforceable. In Count II, Doe asks the Court to enjoin the DEA from rescinding the Settlement Agreement due to its failure to comply with 5 U.S.C. § 2SC2(b)(10) (1994). In Count IV, [2] Plaintiff asks the Court to enjoin the DEA on the theory that "Plaintiff's Fifth Amendment and Due Process Rights have been and will be violated" if the DEA is permitted to rescind the Settlement Agreement. Finally, in Count V, Doe asserts that the DEA's conduct violates the Whistleblower Protection Act, 5 U.S.C. §§ 2302(b)(8) and (9)(V).

II. DISOUSSION

1. Plaintiff's Complaint contains no count III.

In their Omnibus Response, the Federal Defendants argue that this Court has no subject matter jurisdiction to entertain this employment dispute between a federal agency and its former employee. **The Court agrees, and adopts and incorporates herein the Federal Defendants' Omnibus Response, section III.A.**

In United States v. Fausto, 484 U.S. 439, 453 (1988), the Supreme Court held that the Civil Service Reform Act, Pub. L. 95-454, 92 Stat 1111 et seq. (codified, as amended, in various in various sections of 5 U.S.C.) (the "CSRA"), provides the exclusive avenue of relief for a federal employee with a personnel dispute against the government. See LeBlanc v. United States, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (upholding Court of Federal Claims' dismissal of whistleblower claim for lack of subject matter jurisdiction). Under the CSRA all these claims are properly before the Merit System Protection Board (the "MSPB") in Washington DC, the administrative body charged with handling federal personnel disputes. See 5 U.S.C. 7701 (establishing employee's right to review by the MSPB). The Federal Circuit, which charged with reviewing appeals from the MSPB, has stated that "[t]he CSRA exclusively governs federal personnel matters." Booth v. United States, 990 F.2d 617, 619 (Fed. Cir. 1993). 1993).

Fausto held that the CSRA preempted the preexisting "haphazard arrangements for administrative and judicial review of

personnel action," which included applications for mandamus, injunctive and declaratory relief. See Fausto, 484 U.S. at 444. The CSRA established the "primacy" of the MSPB for administrative resolution of personnel disputes, and the "primacy" of the Federal Circuit for judicial review of MSPB proceedings. See id. at 449. As Fausto noted, this procedural structure "enables the development, through the MSPB, of a unitary and consistent Executive Branch position on matters involving personnel action, avoids an "unnecessary layer of judicial review" in lower federal courts, and '[e]ncourages more consistent judicial decisions." Id. at 449 (quoting S.Rep. No. 95-969 at 52). Therefore, in general, all adverse employment decisions covered by the CSRA must be appealed to the MSPB, rather than to the federal district courts, [3]

In Mitchum v. Hurt, 73 F.3d 30, 34-35 (3d Cir. 1995), he Third Circuit acknowledged Fausto and Bush v. Lucas, 462 U.S. 367 (1983), but found that the CCRA left untouched the power of a federal court to grant injunctive relief in constitutional claims. See Hubbard v. EPA, 809 F.2d 1, 11 (D.C. Cir. 1986). The Mitchum Court carved this exception to the general rule that such disputes are otherwise within the exclusive jurisdiction of the MSPB.

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2. An exception exists for the so-called "mixed case," in which a federal employee has charged the government with employment discrimination. See e.g., Blaney v. United States, 34 F.3d 509, 511 (7th Cir. 1994).

Returning to Doe's Complaint, it is immediately evident that Counts I, II and V are of the kind Congress committed exclusively to the MSPB, and must: be dismissed for lack of subject matter jurisdiction. Count I is breach of contract claim for damages, and only incidental equitable relief. Cou[illegible]I is a non-constitutional claim under tile CSRA itself, and is properly before the MSPB. Finally, Count V is a non-constitutional claim under the WPA, a portion of the CSRA, and is also properly before the MSPB.

Doe relies on Mitchum o keep Count IV of his Complaint alive. Count IV is nominally a constitutional claim under the Fifth Amendment and Due Process clause seeking equitable relief. However, considering all of the materials before it, the Court finds that Count IV is Doe's attempt to constitutionalize what is in essence a breach of contract claim. By holding that federal district courts retained 3urisdiction to consider a federal employee's constitutional claim for equitable relief, the Third Circuit created the risk that plaintiffs would perform exactly this exercise of legal gymnastics. See New v. Brown, 1997 WL 666173, * 6 (E.D.Pa. October 21,1997).

On a motion to dismiss for lack of subject matter jurisdiction/ however, the Count need not accept Doe's characterization of his claim as a constitutional one merely because he says so. See Mortensen v. First Federal Savings and

Loan Association, 549 F.2d 884 (-id Cir. 1977). The Court finds that Count IV is essentially a breach of contract claim, and like the others is properly before the MSPB. See Leistiko v. Stone, 134 F.3d 817, 820 (6th Cir. 1998'.

For the foregoing reasons, the Court dismisses Doe's Complaint for lack of subject matter jurisdiction. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DOE :

CIVIL ACTION

v. **UNDER SEAL**

APR 16 1998 FILED

THOMAS CONSTANTINE, et al. NO. 98-1238

FINAL JUDGMENT

AND NOW, this I6th day of April, 1998, upon consideration of the Plaintiff's Motion for a Temporary Restraining Order and the Federal Defendants' Omnibus Response,

IT IS HEREBY ORDERED that:

(1) the Plaintiff's Motion for a Temporary Restraining Order is **DENIED**; and

(2) the Federal Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is; **GRANTED.**

IT IS FURTHER ORDERED that this case is **DISMISSED WITH PREJUDICE.**

[COURT'S EMPHASIS]

BY THE COURT:

/s/ HERBERT J. HUTTON, J.

dctop

U.S. Constitution: Article III

Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, *** to Controversies to which the United States shall be a Party***

Amendment I

Congress shall make no law *** abridging the freedom of speech, *** and to petition the government for a redress of grievances.

Amendment V

No person shall be *** be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U. S. C. 702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought

5 U. S. C 1201 Appointment of Members of the Merit Systems Protection Board

The Merit Systems Board is composed of 3 Protection members appointed by the President, by and with the advice and consent of the Senate, not more than 2 of whom may be adherents of the same political party. The members of the Board shall be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board. No member of the Board may hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President. The Board shall have an official seal which shall be judicially noticed. The Board shall have its principal office in the District of Columbia and may have field offices in other appropriate locations.

5 U. S. C. 2302. Prohibited personnel practices

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority -

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of -

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences -

(i) a violation of any law, rule, or regulation, or

(iii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by aw and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

B) any disclosure to the Special Counsel, or to the Designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences -

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of -

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the

individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title. This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

5 U. S. C. 7703.

Judicial review of decisions of the Merit Systems Protection Board

(a) (1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision. (2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b) (1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the Board. (2) Cases of discrimination [OMITTED]

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall re the petitioner received notice of the final order or decision of view the record and hold unlawful and set aside any agency action, findings, or conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence; except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall

have the right to have the facts subject to trial de novo by the reviewing court.(d) The Director [OMITTED]

28 U. S. C. 1331. Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DOE

CIVIL ACTION NO. 98 CV 1238

Plaintiff

V.

FILED UNDER SEAL
CONFIDENTIAL

Thomas Constantine
Administrator
Drug Enforcement Administration
Washington, DC 20537

and

JURY TRIAL DEMANDED

Peter F. Gruden
Special Agent
Drug Enforcement Administration
Washington, DC 20537

Defendants

COMPLAINT

SUMMARY AND NATURE OF THE ACTION

In this action, Plaintiff, a Special Agent of the United States Drug Enforcement Administration (DEA) who had seven years of exemplary service until his resignation from DEA on 2/28/98 pursuant to the Settlement Agreement with DEA signed 2/4/98 (Copy attached as Exhibit A), seeks, inter alia, the following relief:

A. A temporary and permanent injunction preventing Defendants from firing Plaintiff on the basis of a "Firing Proposal" DEA made on October 15, 1997 which asserts defamatory off-duty conduct by Plaintiff (which conduct, even if true as alleged by DEA, has never had any effect upon Plaintiff's ability to perform his job for DEA).

B. A temporary and permanent injunction preventing Defendant Gruden, a low-ranking DEA Special Agent, from rescinding the Settlement Agreement of 2/4/98, which he purports he can do in his fax letter of 2/23/98 attached as Exhibit B, on the ground Defendant Gruden lacks authority to do so and his authority has never been validated by Defendant Constantine or any other authorized DEA Official. Defendant Gruden's purported "recission" contradicts the Settlement Agreement, Exhibit A, as approved by DEA's Deciding Official and signed by a senior DEA Lawyer after being negotiated by Lynn Goldstein, a "Senior Attorney" of DEA's "Office Of Chief Counsel", as shown in Exhibit E and by Charles A. Walden, Esq. Mr. Walden sent several letters confirming successful negotiation of the Settlement Agreement (which Mr. Walden signed for DEA), including that of 1/27/98 (Exhibit F) and after the Settlement Agreement was executed by Plaintiff and DEA, see attached letter of 2/6/98 (Exhibit G).

C. A temporary and permanent injunction preventing Defendant Gruden from firing Plaintiff on the grounds he is unauthorized to do so. Defendant Gruden states he will "render a decision" on DEA's "Firing Proposal" on Wednesday March 11, 1998 in his letter of March 5, 1998 (copy attached as Exhibit D).

(i) Plaintiff has every reason to expect Defendant Gruden will uphold the "Firing Proposal" and issue a decision firing Plaintiff on March 11, 1998 which will place the indelible stigma of an illegal termination of employment on his record. This stigma will destroy his ability to gain any meaningful employment for the rest of his life even if he can somehow find the enormous amounts of money required to retain Counsel to appeal such firing. Plaintiff will, thus, unless this Court enjoins Defendants, be immediately and irreparably harmed in his reputation and will become essentially unemployable for years and thus permanently harmrd in his ability to make a living and find employment unless this Court enjoins Defendants as requested.

D. A temporary and permanent injunction enjoining Defendants from depriving him of his Property under the Fifth Amendment. In purporting to be able to fire Plaintiff on March 11, 1998, Defendant Gruden and DEA assert that the Settlement Agreement of 2/4/98 negotiated with DEA at the highest levels between

10/15/97 and 2/4/98 was "unauthorized" by DEA and that he has "rescinded" the same and intends to "decide" the "Firing Proposal on March 11, 1998 (Exhibit D), which "Firing Proposal" was the key issue resolved and put to bed by the Settlement Agreement, Exhibit A.

(i) The Settlement Agreement, Exhibit A, is a valid contract binding DEA and Plaintiff and is a Property Right of Plaintiff. Defendant Gruden's bizarre attempt to subsequently "rescind" such a binding contract with Plaintiff is in violation his rights under the Constitution of the United States, including his Fifth Amendment Right that the Federal Government cannot arbitrarily deprive him of his Property without due process of law.

E. To enjoin Defendants from firing him in retaliation for being a "Whistleblower", i. e., disclosing gross mismanagement by DEA to the proper Federal Authorities and Member(s) of Congress pursuant to the "Whistleblower" Statute, 5 U. S. C. 2302 et seq.

F. Plaintiff also seeks Declaratory Judgment that the Settlement Agreement attached as Exhibit A between Drug Enforcement Administration ("DEA") of the United States Department of Justice ("DOJ") entered into between Plaintiff and DEA as of February 4, 1998 is a valid and enforceable contract and that Defendant Gruden's

assertion faxed to Plaintiff's counsel on February 23, 1998 (Exhibit B) that the Settlement Agreement is an "unauthorized agreement, and is hereby rescinded" is of no legal effect; and further, that Defendant Gruden, in clear violation of law, has appointed himself as "the Deciding Official" in this matter to render a decision on the notice of proposed removal, notwithstanding such issues were fully resolved by the Settlement Agreement. (A copy of Defendant Gruden's fax transmitted 2/23/98 is attached as Exhibit B. Portions of all Exhibits which identify Doe's actual name have been redacted herein for privacy and security purposes.)

JURISDICTION

1. In this action Plaintiff seeks a temporary and permanent injunction as set forth above. Thus, Plaintiff seeks Declaratory and Equitable relief for violations of his rights under Federal Statutory Law and his Rights secured to him by the Fifth Amendment to the United States Constitution.

1A. This court has Original Jurisdiction over the subject matter of under 28 USC, Sections 1331 and 1343(a). This Court also has Original Jurisdiction under 28 U. S. C. 1346(a)(2) with respect to that portion of the Complaint which asserts rights founded upon an express contract with the

United States, as well as original jurisdiction under 28 U. s. C 1361 because this Count seeks to compel Defendants and United States Government employees and an agency of the United States to perform duties under the contract owed to Plaintiff. In addition, this Court has Jurisdiction pursuant to the Declaratory Judgment Act, 28 U. S. C. 2201 et seq.

1B. Venue is proper in this district pursuant to 28 USC 1391(e)(3), as no real estate is involved in this action and Plaintiff resides in the Eastern District of Pennsylvania.

THE PARTIES
THE PLAINTIFF-GENERAL BACKGROUND

2. "John Doe" is a code name for Plaintiff, an adult employee of the Drug Enforcement Administration (DEA). Plaintiff resides in this District at a location which will be provided by his undersigned Counsel to the Court and Counsel for Defendants under seal upon Order of this Court. Plaintiff has, upon advice of Counsel, employed the code name and undisclosed residence address for his protection and for the protection and safety of his co-workers at DEA and for the secret and secure preservation of classified and sensitive information. Plaintiff's signature on the Verification of this Complaint has been redacted for the same reasons.

3. Plaintiff has been employed by the DEA for more than seven years as a Special Agent. During the period since 1993, for example, Plaintiff has received yearly evaluations of his performance which have been either the highest attainable rank or the next to highest attainable rank.

4. During his DEA career and since 1993, Plaintiff has been engaged in highly dangerous and stressful law enforcement activities involving individuals and groups dealing in narcotics and other illegal drugs, both in the United States and in foreign countries, all at tremendous personal risk.

5. During the 1990s, Plaintiff was selected on the basis of merit, for the highly prestigious but extremely dangerous "Snowcap" Organization within DEA. In preparing for this position, Plaintiff was put through an in-depth foreign language course to make him fluent in that language, which is the primary language spoken by the major drug cartel members in foreign countries and their associates and employees in the United States. As part of his Snowcap training, Plaintiff successfully completed the extraordinary rigorous United States Navy "SEAL" and United States Army "Ranger" training courses for DEA personnel.

6. After successfully completing the above courses, Plaintiff was, from time to time, on short notice during the 1990s, sent to Foreign Countries with other Snowcap DEA agents where he and they performed

tremendously dangerous operations to destroy with explosives drug labs and to assist foreign law enforcement personnel to apprehend foreign drug "King Pins". During these trips to such countries, no fewer than five (5) Snowcap members lost their lives.

7. After 1993, Plaintiff was selected to be a member of a Top Secret DEA function aimed at interdicting the flow of drugs into the United States, herein referred to as "X" Group. Plaintiff has refused to divulge the location of this facility or what it does to his Counsel on the grounds of National Security and has advised them that, when he was assigned by DEA to this facility, DEA required him to sign a Secrecy Agreement which prevents him from ever disclosing information about the functions and/or objectives of this facility, which Secrecy Agreement is still in force and binding upon Plaintiff. The "X" Group facility is where Plaintiff was working when he was placed on administrative leave in October 1997.

THE DEFENDANTS

8. Defendant Thomas Constantine is Administrator of the DEA and, subject to the commands of the Attorney General of the United States and the President, if any, is ultimately responsible for the operations and policies of the DEA and its employees.

9. Defendant Gruden is, upon information and belief, a DEA Special Agent. As set forth in his fax

Exhibit B, he is "Special Agent in Charge of DEA's Washington Field Division".

10. Defendant Gruden is, upon information and belief, a career DEA employee who is not independent of the wishes of DEA's senior management, but is, to the contrary, entirely subject to the commands of Defendant Administrator. Notwithstanding his complete lack of independence, it appears to Plaintiff that Defendant Gruden is either acting on his own or that Defendant Gruden has been specially assigned by Defendant Constantine to rescind the Settlement Agreement and then, as a self-appointed Deciding Officer, to decide whether to fire Plaintiff as proposed by DEA in October 15, 1997. Plaintiff has reason to believe he has every intention of making such decision at any time on March 11, 1998 as Defendant Gruden indicates in his fax of 3/5/98, Exhibit D.

11. As Defendant Gruden states in his fax, Exhibit B, even though he will "shortly" be returning to his Special Agent position, "Nevertheless, because I have made this decision in my capacity as Acting Deputy Administrator, I will retain jurisdiction over this matter". Apparently, this Defendant means that he will occupy his Special Agent position, an active daily duty role as well as acting as a Deciding Officer regarding Plaintiff.

COUNT I

FOR MONETARY DAMAGES AND FOR EQUITABLE RELIEF WHICH IS INCIDENT AND COLLATERAL TO PLAINTIFF'S CLAIM FOR MONEY DAMAGES

12. DEA notified Plaintiff on 10/15/97 that it proposed to fire him for off duty non-job related conduct in 1993 (hereinafter the "Firing Proposal") The notification was made after Plaintiff was interviewed regarding the 1993 matter in April of 1997 and, notwithstanding DEA's subsequent stance that the alleged off-duty conduct was so serious as to justify termination of Plaintiff, a loyal, brave and experienced Special Agent, it permitted Plaintiff to remain in his top secret position at the most sensitive facility which DEA has ("X" Group) from April to October of 1997 when he was placed on administrative leave.

13. From October 1997 until February 4, 1998, by his Counsel, Plaintiff negotiated with Senior lawyers for DEA, including Charles Walden, Esq., the Associate Chief Counsel For Administrative Law for DEA. After lengthy negotiations, the parties agreed to settle the issues between them, including the Firing Proposal and a draft decision thereon by the then Deciding Officer, Mark Greenlee (which decision was withdrawn by DEA and destroyed by it in accordance with the Settlement Agreement.). The settlement was effected by the Settlement Agreement of February 4, 1998 attached hereto as Exhibit A, with portions redacted to protect Plaintiff's

privacy and DEA security. After the signing of the Settlement Agreement, the DEA and Plaintiff both acted in reliance on it. The DEA rescinded the Greenlee draft, restored Plaintiff to full duty status, placed Plaintiff on vacation pay and DEA's Chief Of Operations, Marshall, sent Plaintiff a notice regarding Plaintiff's request for transfer to DEA's Air Wing, all as set forth and contemplated by the Settlement Agreement.

14. Nineteen days after the settlement, namely, on 2/23/98, Defendant Gruden sent Exhibit B via fax to Plaintiff's Counsel, Herman T. Bayless, Esq.. which fax purports to rescind the Settlement Agreement February 4, 1998 and to re-open the entire matter. (Exhibit B is the fax of Defendant Gruden transmitted February 23, 1998.) Upon information and belief, Defendant Gruden is not a lawyer and wrote Exhibit A without advice of Legal counsel.

15. The Settlement Agreement, Exhibit A, however, is a binding contract which cannot be unilaterally rescinded by an Acting Administrator of DEA, especially when that individual in reality is a full-time Field Agent of DEA, not a Lawyer and who wrote Exhibit B without the advice of Counsel. Plaintiff asserts that the Settlement Agreement must be specifically enforced and the provisions thereof performed by DEA and seeks an Order from this Court compelling such performance by Defendants.

16. Under the Settlement Agreement, Plaintiff announced he would resign no later than February 28, 1998 to pursue a career in commercial aviation in the event his request for transfer to DEA's Air Wing was denied. That request was denied on February 9, 1998.

17. Accordingly, after said denial of transfer, relying upon the terms of the Settlement Agreement, Plaintiff paid thousands of dollars for tuition for specialized training in aeronautics at a school in Florida for training after his resignation from DEA, which resignation Plaintiff planned to transmit to DEA on or prior to February 28, 1998; Plaintiff now has been sternly warned NOT to resign by Defendant Gruden in his fax received 2/23/98, Exhibit B, even though Plaintiff was obligated to resign under the Settlement Agreement no later than the end of February 1998. Plaintiff submitted his resignation to DEA pursuant to the Settlement Agreement by fax on 2/28/98 in strict reliance upon, and in express compliance with, the Settlement Agreement.

17A. The arbitrary and illegal attempt to rescind the Settlement Agreement by Defendant Gruden per Exhibit B will prevent or delay Plaintiff's training and will, in addition to costing Plaintiff thousands of dollars, cause Plaintiff irreparable harm, including tremendous damage to his reputation which can never be erased. Plaintiff will also suffer irreparable emotional harm, and already has been badly damaged emotionally by the purported "recission", as he believed that the Settlement

Agreement had finally put the nightmare of the phony DEA firing charges behind him and that he had acted honorably and sensibly in relying on the Settlement Agreement to begin training for a new career in commercial aviation.

17AA. If DEA fires Plaintiff, it will render him unemployable in the specific area of commercial aviation he is now training for and thus such decision will cost Plaintiff the thousands of dollars he has paid for such training. Therefore, Plaintiff will incur that amount as damages. In addition, Plaintiff's ability to concentrate on the extremely difficult courses he is now taking for FAA certification has been greatly harmed and his test scores are being driven down by the necessity of spending hours of time conferring with his Counsel regarding this litigation, which again has caused Plaintiff severe monetary damages. In addition, Plaintiff has spent and incurred more than $50,000 in Attorney's fees in connection with dealing with DEA and this litigation, which has damaged him financially.

17B. Pursuant to the Settlement Agreement of 2/4/98 and upon advice of Counsel, Plaintiff has authorized the submission of applications for employment which list Ms. Fulmore of DEA as the person to whom the prospective employers he has written as the only person who may provide information about his career with DEA, as Plaintiff is precisely required to do by the Settlement Agreement, Exhibit A. However, as of March 8, 1998,

Ms. Fulmore has not responded to a single one of these several employment applications, all made to prospective employers in the private sector, even though one such prospective employer sent a fax to Ms. Fulmore on or about 3/4/98 that a position was open but that her verification of Plaintiff's employment history was needed by return fax or the position would be filled by another applicant.

17C. Plaintiff will be finished with his training in Florida on 4/6/98 and desperately needs to apply for jobs now to commence right after his application to put food on his table. However, Plaintiff alleges that DEA has ordered Ms. Fulmore NOT to respond to any employment inquiries from prospective private sector employers until further notice and thus, without an ability to verify his employment, Plaintiff will be unable to obtain any employment of any consequence without her response as to his DEA career.

WHEREFORE, Plaintiff seeks punitive and actual damages caused by Defendants's actions described herein and, incidental thereto, an order from this Court compelling Defendants to fully and timely perform their obligations to Plaintiff under the Settlement Agreement, Exhibit A and a Declaratory Judgment that such Agreement is valid and enforceable and for attorney's fees.

II. DEFENDANTS' PROPOSED EMPLOYMENT TERMINATION OF PLAINTIFF VIOLATES FEDERAL LAW

18. Plaintiff repeats and realleges the allegations hereinabove and incorporates the same herein.

19. 5 USC 2302 governs the manner by which DEA must proceed in cases of proposed terminations. Section 2302(b)(10) prohibits adverse DEA actions for "conduct which does not adversely affect the performance of the employee".

20. The off-duty conduct of Plaintiff in 1993 has never adversely affected Plaintiff's performance for DEA. Indeed, Defendants have admitted, via premier performance evaluations of Plaintiff since 1993 and from then to and including 1997, as well as statements by "Pete McCormick", Plaintiff's "Line 2 Supervisor" (i. e. boss of Plaintiff's boss) that Plaintiff has been an exceptionally courageous and effective agent of DEA.

20A. DEA has further admitted that the alleged off-duty 1993 conduct charged in the "Firing Proposal" did not and has not affected Plaintiff's ability to perform his DEA jobs. Prior to 1997, Plaintiff received each year very superior performance evaluations, as set forth in Ms. Fulmore's letter for future employers attached to and made part of the Settlement Agreement, Exhibit A. Moreover, in 1997, by leaving him in DEA's most sensitive Top Secret job at Group "X" for six (6) months after the DEA had

completed its investigation into the 1993 conduct and complied all of the "facts" regarding it, DEA obviously conceded that Plaintiff's 1993 conduct in no way adversely affected his on-the-job performance for DEA.

WHEREFORE, pursuant to 2302(b)(10), Plaintiff requests this court enjoin Defendants from rescinding the Settlement Agreement and further issue an order that the "Whistleblower" conduct of Plaintiff is not grounds for rescinding the Settlement Agreement or for firing Plaintiff

.

IV. DEFENDANTS' PROPOSED EMPLOYMENT TERMINATION OF PLAINTIFF VIOLATES FEDERAL LAW AND PLAINTIFF'S RIGHT TO DUE PROCESS OF LAW

21. Plaintiff repeats and realleges the allegations hereinabove and incorporates the same herein.

22. Unless enjoined by this Court, Defendants' proposed termination of Plaintiff will be decided by Defendant Gruden. However, as alleged, that DEA official is not independent of DEA and, in fact, his entire career depends upon doing what his DEA superiors want.

23. Hence, Plaintiff has no realistic chance of receiving a decision from Defendant Gruden which is contrary to the Firing Proposal.

24. Moreover, in the more-than-likely event Defendant Gruden affirms the Firing Proposal, Plaintiff will be terminated on that very day from the DEA, whereby he will instantly be deprived of reputation and

employability. Since Defendants have refused to accept Plaintiff's resignation and have ordered Plaintiff not to resign and not to look for other employment until such decision is made, an adverse decision will place Plaintiff on the streets with no job and no income and no medical insurance.

25. Plaintiff is now and in the future will be required to complete application forms for jobs, a high percentage of which will, in one way or the other, inquire if Plaintiff was ever fired. Even if the Firing Proposal is affirmed by Defendant Gruden and then reversed by a Court or other body of competent power, Plaintiff will always be required "yes" to answer that "Scarlet Letter" question: "were you ever fired or terminated?" and thus will be forced to discuss the unverified charges levelled against him.

26. To most employers, the fact that a firing is reversed by a court is insufficient to overcome the stigma. A firing is a "red flag" suggesting that any person fired may well be a "trouble-maker". Attached as Exhibit C is the Declaration of Armintrout, an expert in employment, who concludes that a persons fired who thereafter litigates the firing is, in fact, viewed very negatively by virtually any significant employer in modern American business.

27. Thus, whereas the Settlement Agreement, in respect of private sector employers (as well as any prospective law enforcement or intelligence employers) ensures that the information which will be released about

Plaintiff's career with DEA is appropriate and protects him from unsubstantiated outrageous sexual charges, a DEA firing would permit DEA to release any information of the negative type, including unsubstantiated raw data which DEA has used in its Firing Proposal, which would irreparably harm Plaintiff.

27A. Moreover, a DEA firing would ensure that Plaintiff would be forced to disclose the unsubstantiated allegations about him to every potential employer for the rest of his life.

28. Plaintiff has a Due process Right to have the merits or the DEA Firing Proposal heard by a Judicial Officer who is completely independent of the DEA or the Defendants in the event this Court does not uphold the validity of the Settlement Agreement.

WHEREFORE, Plaintiff request this court enjoin Defendants from rescinding the Settlement Agreement and further issuing a Declaratory Judgment that the alleged conduct of Plaintiff is not grounds for firing Plaintiff and that Plaintiff's Fifth Amendment and Due Process Rights have been and will be violated by resurrecting the Firing Proposal and permitting it to be decided by Defendant Gruden.

COUNT V

PLAINTIFF IS BEING FIRED BY DEA BUREAUCRATS BECAUSE THEY FEAR HE HAS AND WILL "BLOW THE WHISTLE" ABOUT THE GROSS MISMANAGEMENT OF GROUP X

29. While assigned a Field Office in the United States, Plaintiff witnessed a local law enforcement officer who was assigned to work with Plaintiff's DEA team, artificially stimulate his drug dog to "alert" (i. e. "hit") a piece of luggage which the officer suspected contained drug related proceeds (such as cash) but had no positive proof thereof. However, when prompted by its handler, the dog "hit" the luggage to support probable cause that the luggage contained drug related proceeds. The cash was seized and the officer's police department received about 15% of the approximately $260,000 seized.

30. However, a few months later, Plaintiff and DEA agent, Sterling, who had been with Plaintiff, learned the dog was not certified as a canine detection dog and realized that the "hit" was due to the handler's illegal prompting.

31. Plaintiff's DEA training thoroughly indoctrinated him as to the rights of American Citizens to be free from unreasonable searches and seizures and arrest without probable cause. Plaintiff therefore believed that the use of an uncertified dog and the artificial stimulation of that dog to support the seizure was blatantly illegal and, together with Agent Sterling, promptly complained to their DEA supervisor, Mavromatis, at the Field Office in question, but DEA did nothing to rectify this illegal aspect of the seizure or to retrieve the 15% cash given to the local

police. The dog handler is the son of the chief of that police department.

32. Plaintiff believes and therefore avers that his "whistleblowing" in the Field Office became known to his superiors at Group X and, prior to 1997, the X Group supervisors targeted Plaintiff for termination on any pretext as a preemptive strike to prevent Plaintiff from blowing the whistle on their gross mismanagement of "X" Group.

33. The immediate group of DEA agents with whom Plaintiff worked at "X" Group is small but each person is engaged in some of the most sensitive work in DEA.

34. To the dismay of Plaintiff, "X" Group includes a person who is seriously alcoholic who has been hospitalized for that condition and who has, on several occasions, been AWOL from his DEA duties at "X" Group.

35. The alcoholic told Plaintiff that he had avoided severe punishment because, in essence, he was "tight" with the supervisors at "X" Group and that they told him they would "work out" the matter with Mark Greenlee. (Greenlee is a "Deciding Officer" at DEA headquarters whose assignment is to decide recommendations for disciplinary actions and terminations made by DEA's OPR and is forbidden from having any contact with any DEA personnel other than his DEA legal counsel who assist him in making decisions on proposals.)

As it turned out, the reprimand administered by Greenlee was that the alcoholic received a few days suspension for the very serious AWOL in the Fall of 1997. The alcoholic has told Plaintiff that his superiors at "X" Group agreed with Greenlee to mete out only the few days suspension.

36. A fellow DEA agent at X told Plaintiff that the alcoholic should have been given a very severe punishment for going AWOL at the Top Secret "X" Group facility and that this agent had complained to Plaintiff's supervisor at "X" Group regarding the wrist slap and also vigorously complained to that supervisor that having an alcoholic at "X" Group endangers the security of "X" Group and its mission.

37. Also at "X" Group there is a female DEA agent who another DEA agent at "X" Group told Plaintiff is sexually promiscuous and has been sexually involved with at least one DEA senior officer who was at "X" Group but who is now in charge (i. e., is the "SAC") of one of DEA's largest Field Offices. Any such sexual liaison, if discovered by the drug cartels, obviously renders the female at "X" Group and the SAC in serious jeopardy of being blackmailed or otherwise compromised by agents of the drug cartels.

38. At X there are also non-governmental personnel who perform tasks which are highly classified. However, notwithstanding the tremendous importance of ensuring that these persons have completely clean personal histories, the background checks performed

regarding them are, Plaintiff is informed, very sloppy and inadequate.

39. One such non-governmental person has engaged in sexual intercourse with her fellow co-workers in a conference room at "X" Group, according to a statement made to Plaintiff by a DEA agent at "X" Group during the Fall of 1997. Plaintiff believes the DEA Managers at "X" Group are aware of this conduct, or should be aware of it, but have done nothing to stop it. Again, such on-duty sexual conduct is not only dangerous to morale but subjects all who participate to blackmail and similar pressures if the same is discovered by the cartel agents.

40. Not long after joining X Group in the fall of 1996, Plaintiff became aware of the fact that very sensitive documents were being stored in the open such as in the hallway. However, when the Inspection Team of DEA were scheduled to visit, X Group managers directed that such documents be placed in the evidence safe even though those documents were not properly of the type which were to be stored in that safe. Such documents were removed when the Team left. However, documents in the hallway were negligently placed in a burn box, but those sensitive documents were negligently forgotten by the Management at X Group and were, therefore, removed with the other burn boxes during the scheduled burn and were thus destroyed by fire. Consequently, extremely

sensitive and important documents were destroyed as a result of the grosss mismanagement at X Group.

41. As described herein, X Group is a highly classified and very sensitive operation of DEA. As such, common sense would dictate that all reasonable steps be taken to obscure the location of X Group and the identities of the DEA and other persons who work there.

42. However, contrary to elementary common sense, the building foyer reception has "Drug Enforcement Administration" on the wall and, further, posts in the parking lot also have the acronym of Group X on them to designate and reserve such prime parking places for X Group DEA Management. This makes it easy for anyone, especially agents working for the drug cartels, to determine exactly where X Group is and, obviously, to identify the vehicles driven by DEA management, from which the names and residence addresses of such Managers can be easily determined using auto license searches. Such self-serving conduct, such as prominently marking "reserved" parking spaces, while appropriate for corporate settings, provides means for identification of key DEA personnel at "X" Group and is an extreme example of gross mismanagement by X Group Management.

43. In addition, unlike secret facilities of other agencies which employ enclosed parking lots and garages, the parking lot at X Group is on street level and it is possible to photograph or note the vehicle license plate

numbers of all vehicles there by anyone, since anyone can wander around the lot. In fact, Plaintiff noticed several individuals in the lot one night in the Spring of 1997 in a van and another vehicle. Plaintiff asked them what they were doing. These persons replied in Spanish, which Plaintiff speaks, with a flimsy excuse and Plaintiff requested them to depart, which they did. It is quite possible that those persons were drug cartel agents. In any event, via well known methods, the license numbers can be used by agents for the drug cartels to determine the names and addresses of persons who work at X Group. Again this is a gross violation of elementary security practices and is another example of the gross mismanagement by X Group Management.

44. While at X, Plaintiff expressed his extreme concern to another X Group agent that the DEA alcoholic agent might endanger the operating efficiency of Group X and even its security. Moreover, Plaintiff believes that the DEA female agent could well be seduced by drug dealers and blackmailed into revealing secret information and, further, since the non-governmental personnel have not been properly investigated to work at the secret X facility, the sexual activity among that group could also lead to blackmail.

45. Plaintiff thus developed the conclusion that the DEA is and has been guilty of gross mis-management of "X" Group, particularly because such DEA management have long known and currently know about

(a) the alcoholic and, in fact, arranged with Greenlee to fix the case by reducing the penalty for being AWOL from a potential dismissal to a few days, (b) condoned the sexual affair with the DEA senior employee at "X" Group even though this rendered both the female and her sexual partner open to blackmail, (c) were and are negligent to the extreme in failing to insist that all non-governmental employees assigned to "X" Group be comprehensively investigated and (d) knew and permitted the sexual activities of such non-governmental employees during working hours at "X" Group, which activities also subjected any of the participants to blackmail and (e) for the gross mismanagement otherwise described herein.

46. Unlike most agencies of the United States Government, DEA has no independent Inspector General (IG) or similar officer and, in fact, has no IG at all. The DEA "OPR" staff is simply a group of DEA agents at the bureaucratic level who are part of the "buddy" system at DEA and are, Plaintiff believes, good pals of the Management at "X" Group. In any event, as Plaintiff became more and more concerned about the activities described herein as 1996 turned into 1997, he knew of no senior official at DEA who he felt was not part of the "buddy system" to whom he could report these obvious examples of dangerous and gross mismanagement at "X" Group without fear of being the subject of retaliation with nothing of substance being done to correct the mismanagement. Plaintiff was not only embarrassed to be

at such a sloppily managed---and potentially dangerous facility---he had "no way out", i. e., he felt he had no official to whom he could report the gross mismanagement described when he was hit with an accusatory interrogation on April 15, 1998.

47. After he was notified of the Firing Proposal and retained counsel, information relating to the gross mismanagement at "X" Group was given by one of Plaintiff's Counsels to the proper office of the Executive Branch of the Government for Investigation (Office of the Special Counsel) and to Member(s) of the House of Representatives and/or the United States Senate with direct Intelligence Committee assignments and who have the highest security clearances, for analysis by the Committee(s) charged with oversight of DEA and "X" Group.

48. The disclosure of gross mismanagement as aforesaid was pursuant to the "Whistleblowing" Statute, 5 U. S. C. 2302(b) which encourages disclosures by Federal employees of gross mismanagement and prohibits the Federal Agency for whom they work from firing or taking other adverse personnel action against them for reporting gross mismanagement or for retaliating for making such reports.

49. The "Whistleblowing" charges were delivered to Defendant Constantine by a Member of the United States House of Representatives in January 1998 and thus, DEA Management had full knowledge that Plaintiff had

reported the gross mismanagement at "X" Group, as well as the earlier incident described at the Field Office reported by Plaintiff and Special Agent Sterling and had thus engaged in "Whistleblowing". Defendant Constantine promised to "investigate" the charges and in a few weeks thereafter, the Settlement Agreement was signed by the parties.

49. Plaintiff believes and therefore alleges that Defendants knew he had and/or would report the mismanagement at "X" Group in 1997 and thus concocted the Firing Proposal based upon off-duty lawful activity which violated no law to pre-empt Plaintiff from filing the "Whistleblowing" charges.

50. Further, Defendant Gruden's fax, Exhibit A, which purports to rescind a legally binding contract between Plaintiff and DEA negotiated by DEA's second most senior Lawyer and signed by him on behalf of DEA is clearly in retaliation for Plaintiff's "Whistleblowing" actions, including disclosing the obvious gross mismanagement by DEA at "X" Group to Congress and OSC.

51. Thus, even after the Settlement Agreement was signed on February 4, 1997, less than 19 days later, DEA has once again attempted to retaliate and ruin Plaintiff's life and career for "Whistleblowing" and has specially appointed a Field Agent to "rescind" a Settlement Agreement who has willingly done so even without any legal guidance.

52. Plaintiff strongly believes that Defendant Gruden, who is still a DEA Special Agent, is part of the "buddy" system of the "old boys" DEA Management network which includes the DEA supervisors at "X" Group and believes such supervisors have told Defendant Gruden to get rid of---and discredit---Plaintiff because they are now aware that Plaintiff has informed proper Member(s) of Congress and Executive Branch Office(s) of the United States Government of the DEA gross mismanagement of "X" Group. Defendant Gruden's real "assignment" is to fire Plaintiff as soon as possible in direct retaliation for "Whistleblowing" and to discredit Plaintiff in any proceedings involving "X" Group mismanagement, which may soon occur before the proper committee of Congress.

53. Thus, Plaintiff believes Defendant Gruden will, unless enjoined, do DEA Management's bidding and terminate Plaintiff per the Firing Proposal regardless of the truth or the law in order to discredit Plaintiff's "Whistleblowing" charges and to divert attention from the gross mismanagement at "X" Group and make the accuser the accused.

54. DEA's Firing Proposal and Defendant Gruden's fax, Exhibit A, are in direct violation of the Federal Whistleblower Statute, 5 USC 2302(b)(8) including, those provisions to the effect DEA may not terminate an employee because of "(A) Any disclosure of information by an employee . . . . . which the employee . .

. . reasonably believes evidences--- . . . . (ii) gross mismanagement . . . an abuse of authority, or a substantial and specific danger to public . . . .safety".

68. Defendants' actions further expressly violate 5 USC 2303(9)(V) which prohibits DEA from retaliating or threatening to take an adverse personnel action "for cooperating with or disclosing information . . . .to the Special Counsel" and also violates 5 USC 2303(b)(11) which prohibits "taking of any personnel action against an employee who discloses information to the Congress."

WHEREFORE, Plaintiff requests that this Court declare Defendants' attempt to rescind the Settlement Agreement void in law and a malicious violation of the "Whistleblowing" Statute, 5 USC 2302(b) and award Plaintiff Attorneys' Fees, costs and punitive damages.

Stuart S. Bowie
206 Knoll Road
Wallingford, PA 19086
TEL: 610-565-2252
FAX: 610-565-2125
PA ATTY # 10237

March 8, 1998

Of Counsel:
Herman T. Bayless, Esq.
118 Main Street
Sturbridge, MA 01566
TEL: 508-347-1266
BY FAX: 508-347-1315

Declaration I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to

be true and further that these statements were made with the knowledge that willful false statements and the like are punishable by fine or imprisonment, or both, under section 1001 of Title 18 of the United States Code.

SIGNATURE REDACTED AS FILED
[NAME REDACTED AS FILED]

March 8, 1998 fedcom5

COMPLAINT, EXHIBIT A

DRUG ENFORCEMENT ADMINISTRATION
WASHINGTON, D.C. 20537

IN THE MATTER OF: [John Doe]

SETTLEMENT AGREEMENT

This Settlement Agreement (hereinafter referred to as "Agreement") is made and entered into this 4th day of February 1998, by and bg24

etween Special Agent [John Doe] and the United States Department of Justice, Drug Enforcement Administration (hereinafter referred to as "DEA" or "Agency").

1. Certain issues have arisen between Special Agent [DOE] and the Drug Enforcement Administration (DEA) which the parties, intending to be legally bound, have decided to resolve as follows:

a. The date above is the effective date of this agreement.

b. On the next business day after the execution of this agreement, Agent [DOE] will be returned to full duty status and will be on annual leave until February 28, 1998.

c. Agent [DOE] has heretofore requested that he be transferred to DEA's Air Wing. DEA agrees that it shall, during the period of February 9, 1998, to February 28, 1998, advise Agent [DOE] in writing whether his request is granted. In the event that this request for transfer is denied, Agent [DOE] will submit his resignation to be effective within 20 calendar days of being advised of such declination in order to pursue a career in commercial aviation.

d. After the submission of the resignation referred to in paragraph (c) above, Agent [DOE] shall be promptly be paid for any unused leave (including 80 hours of restored annual leave/furlough) and shall otherwise be given all benefits and entitlements that other resigning DEA employees receive.

The parties further agree that, in the event Agent [DOE] resigns pursuant to the provisions of Paragraph l(c):

A. Agent [DOE] hereby withdraws all current and waives all future actions, appeals, grievances, and complaints now pending in any forum and seeks their dismissal with prejudice. This includes all actions now pending, whether as grievances, EEO complaints, or Freedom of Information Act (hereinafter referred to as "FOIA") requests within DEA or the Department of Justice or before any administrative agency or court, including, but not limited to, the Merit Systems Protection Board, Equal Employment Opportunity Commission, Office of Special Counsel,

and United States District Court and United States Courts of Appeal.

B. Agent [DOE] has reviewed and fully understands the terms and conditions of this Agreement and voluntarily agrees to the terms and conditions set forth herein. Agent [DOE] has had ample time to consider these conditions, to seek the advice of an attorney or other qualified representative, and is aware that certain administrative remedies are available.

Agent [DOE] will complete a Standard Form (hereinafter referred to as "SF") 52 and other appropriate paperwork indicating that he resigned. Such paperwork shall be sent to his Counsel, Herman T. Bayless, Esquire, for review. Agent [DOE] may execute the forms at his counsel's office in which case said counsel shall forward the completed forms to the Deputy Assistant Administrator for Personnel, Drug Enforcement Administration.

D. The DEA Office of Personnel shall ensure that Agent [DOE]'s SF-50 and associated paperwork will state that Agent [DOE] left the employ of DEA to pursue a career in commercial aviation. Copies of these documents will be forwarded to counsel for Agent [DOE] promptly after they are available.

E. DEA will ensure that the personnel records and associated paperwork maintained or archived by the agency will not have any remarks or indication which refer to this Agreement or to any administrative matter, proposals, adverse actions, adverse decisions or other information derogatory in nature about Agent [DOE]'s employment as it relates to this matter.

F. Except as permitted by Paragraph K below, Agent [DOE]'s Official Personnel File (OPF) will not have any remarks or indication therein referring to this agreement, administrative matter, proposals, adverse actions, adverse decisions, or any other statement (including coding) derogatory in nature concerning Agent [DOE]'s employment as it relates to this matter.

G. DEA agrees that, upon execution hereof, it shall provide **Agent [DOE] with a letter directing him to provide the title and address of the Deputy Assistant Administrator for Personnel at DEA Headquarters to any party making an inquiry of Agent [DOE]'s past employment with DEA. A copy of this letter is Attachment A. DEA agrees the information on Attachment A is the only information DEA will release to a private sector employer or private sector prospective employer and that it will only make such release upon written authorization of Mr. [DOE].**

H. Mr. [DOE] expressly agrees to provide the title and address of the DEA Deputy Assistant Administrator for Personnel in Washington, D.C. to any prospective employer making inquiry of Mr. [DOE]'s past employment with this agency and to advise DEA's Deputy Assistant Administrator for Personnel to which prospective employer he has made application.

I. DEA agrees that it shall maintain the files and materials related to this matter and its only copy of this agreement in a sealed envelope in a locked file in the Office of Personnel and shall do so in a manner to afford the strictest confidence to this agreement. This envelope will simply have the name of Agent

[DOE] on its exterior plus the legend: "TO BE OPENED BY THE DEPUTY ASSISTANT ADMINISTRATOR FOR PERSONNEL ONLY PRIVATE MATTERS." The envelope shall be permanently sealed with the signature of the Deputy Assistant Administrator for Personnel, DEA, and date of that signature across the seal. The envelope will be of a type which cannot be opened without irreparable evidence of such entry. This envelope shall only be opened in accord with the provisions of paragraph K. A photocopy of the seal of this envelope shall be made and faxed to Agent [DOE] and his counsel.

J. DEA will not authorize any individual or entity to provide information regarding Agent [DOE] s employment to any prospective employers or other persons or entities, other than such information as may be disseminated by the DEA Deputy Assistant Administrator for Personnel. DEA will take action to specifically instruct the former immediate co-workers and supervisory chain of Agent [DOE] that the underlying matters covered by this agreement are strictly confidential and may not be discussed or divulged to anyone and that any inquiries they receive for information concerning Agent [DOE] shall be promptly directed to the Deputy Assistant Administrator for Personnel.

K. (1) DEA agrees that Agent [DOE]'s OPF or other appropriate file shall contain a memorandum with the following information and that, if any written inquiry concerning Mr. [DOE] is received, the DEA Deputy Assistant Administrator for Personnel will provide the following information, provided Agent [DOE] authorizes the release of this information in writing:

If any inquiry concerning Mr. [DOE] is received from a potential employer, which is not a law enforcement agency or intelligence entity, DEA shall provide only the following information:

Mr. [DOE] was employed by the Drug Enforcement Administration from November 4, 1990, to February 28, 1998, resigned for personal reasons to pursue a career in commercial aviation. During the course of his employment with DEA, he received six annual evaluations: two ratings were "Fully Successful, three ratings were "Excellent," and one rating was "Outstanding."

(2) If any inquiry concerning Agent [DOE] is received from a law enforcement agency or intelligence entity, DEA will not respond to the inquiry immediately. Instead, as stated in paragraph L below, DEA will contact Agent [DOE] and his counsel in writing, and advise Agent [DOE] or his representative, in accord with the provisions of that paragraph, that a request for information has been received. DEA shall not provide any information to a requesting party unless the validity of the request has been confirmed by Agent [DOE] and his counsel in writing.

(2)(a) Agent [DOE] was employed by the Drug Enforcement Administration from November 4, 1990, to February 28, 1998, at which time he resigned at the conclusion of an internal investigation but prior to formalizing any decision or action thereon. Agent [DOE] vigorously denied any wrongdoing and chose to leave the employ of DEA to pursue a career in commercial aviation. During the course of his employment with

DEA, he received six annual evaluations: two ratings were "Fully Successful, three ratings were "Excellent," and one rating was "Outstanding."

(2)(b) If, however, the law enforcement agency or intelligence entity requests relevant information in support of the internal investigation, the Deputy Assistant Administrator for Personnel or his/her designee may provide such relevant information pursuant to paragraph L.

L. DEA agrees that it will provide any information to a law enforcement agency or intelligence entity ONLY upon: (i) presentation of a signed release by Agent DOE authorizing such release of information AND (ii) after advising Agent DOE and his counsel in writing and by certified mail (or other means to ensure the receipt of delivery) that a request for such information has been received. Such notice will be dispatched to Agent DOE's representatives to the addressees listed in Attachment B hereto. DEA shall not release any information unless confirmation of the validity of the original release is confirmed by Agent DOE and his counsel in writing.

M. This agreement does not constitute and shall not constitute or be construed as an admission of liability or violation of any law, regulation, or rule by DEA, nor shall the Agreement constitute an admission by Agent DOE that he violated any law, regulation, order or rule.

N. Each party will waive, abandon, and release the other party, its officers, employees, assigns, heirs, and agents from any action, suit, claim, grievance, decision, proposal, decision on a

proposal, or demand from this matter and any decisions are hereby rescinded and canceled with prejudice.

O. (1) This Agreement represents the full and complete agreement of the parties hereto.

(2) Each party will be responsible for its own costs and attorney fees arising from this matter.

(3) The terms and provisions of this agreement shall be executed in good faith.

P. The terms of this Agreement shall not be disclosed to any third party, except as provided above.

Q. The parties agree that facsimile signatures shall be valid to execute this agreement.

Dated this 4th day of
February 1998.

/s/ [DOE]
Special Agent
Drug Enforcement Administration

Dated this 4th day of
February 1998.

/s/ HERMAN T. BAYLESS, ESQ.
Counsel for Mr. [DOE]

Dated this 4th day of
February, 1998.

/s/ CHARLES A. WALDEN
Associate Chief Counsel
for Administrative Law
Drug Enforcement Administration

Attachments:

A - Letter from Deputy Assistant Administrator for Personnel to Mr. [DOE]
B - List of Mr. [DOE]'s representatives to be contacted when a request for information has been received

ATTACHMENT A

FEB 02 '98 18:49 FR OFC CHIEF COUNSEL 202 307 7950 TO 8508341315 [FAX HEADER SHOWING DOCUMENT SENT FROM DEA GENERAL COUNSEL'S OFFICE]

U.S. Department of Justice
Drug Enforcement Administration
Washington, DC 20537

Office of Personnel
700 Army Navy Drive
Arlington, VA 22202

February 28, 1998 [Letter to John Doe]
Dear Mr. [DOE]

In the event you apply for position in the private sector, you may provide a copy of this letter to such prospective employer.

Regarding the law enforcement career of Mr. [DOE] with the Drug Enforcement Administration (DEA), please be advised that Mr. DOE served as a Special Agent with DEA from November 4, 1490 until he resigned on **to pursue a career in commercial aviation.**

During the course of his employment with DEA, Mr. Doe received the following performance evaluations: in 1992, fully successful; in 1993, fully successful; in 1994, excellent; in 1996, outstanding; and in 1997, excellent.

The undersigned is the only authorized point of contact to provide information concerning the past employment of DEA employees. To ensure the authenticity of such inquiries, these requests must be in writing and will be verified through the former employee.

Sincerely,

Retha M. Fulmore
Deputy Assistant Administrator
Office of Personnel

COMPLAINT, EXHIBIT B

U. S. Department of Justice
Drug Enforcement Administration
Office of the Deputy Administrator

FEB 2 0 1998

Herman T. Bayless, Esq.
118 Main Street
Sturbridge, Massachusetts 01566

SUBJECT: Your client [DOE]

Dear Mr. Bayless:

It has recently come to my attention that subordinate elements in this agency entered a settlement agreement with your client in connection with the agency's proposal to remove him from service for six specifications of conduct unbecoming a Drug Enforcement Administration (DEA) Special Agent. While the agency's representatives had authority to accept a resignation in lieu of removal, he did not have the authority to

bind the agency to the conditions placed on the resignation contained in the agreement. Because the individuals involved with the settlement agreement lacked authority, the agreement is not binding on the agency.

In light of the conduct in which your client is alleged to have engaged, masturbating on several occasions knowing he was in open view of minor children, this agency cannot agree to limit the information provided to prospective employers who seek information about the cause of Mr. [DOE]'s severance from DEA employment. As a leader in law enforcement, a profession which pledges to protect the public, DEA cannot agree to be silent when information about Mr. [DOE]'s conduct may be significant to a prospective employer. Accordingly, as Acting Deputy Administrator, I cannot ratify this unauthorized agreement, and it is hereby rescinded.

I will review the entire file, including your client's written response to the notice of proposed removal and the notes of his oral response, and I will serve as the Deciding Official in this matter. Upon completion of the review, I will advise your client of my decision on the notice of proposed removal. He should not submit his resignation as planned unless he intends that the resignation be unfettered by limitations on disclosures other than those imposed by the Privacy Act, 5 U.S.C. § 552a.

I will shortly be returning to my post as Special Agent in Charge of DEA's Washington Field Division. Nevertheless, because I have made this decision in my capacity as Acting

Deputy Administrator, I will retain jurisdiction over this matter. If you have any questions, I can be reached at (202) 305-8120.

Sincerely,
/s/ Peter F. Gruden
Acting Deputy Administrator
By facsimile: (S08) 347-1315

COMPLAINT, EXHIBIT C

DECLARATION OF EDWARD ARMINTROUT

1. My full name is Edward Armintrout and I reside at 1661 Inca Drive, Laramie, WY 82070. I am 57 years of age, a college graduate and a United States Citizen.

2. I have approximately 30 years experience in the field of Human Resource Management for a number of large companies, including the following: Litton Industries, Wells Fargo, Syntex, McDonnell-Douglas Corporation (a major Defense Contractor) and Syva Corporation (developer of an important heroin-detection drug).

3. At the present time, I teach Human Resources Management in a private school located in Laramie, Wyoming.

4. I consider myself and am considered by my peers, as an expert in matters relating to hiring and firing of employees for both sensitive (e. g., matters including National Security, Corporate Trade Secrets and similar matters) and non-sensitive positions, especially with hiring and firing practices which are followed in actual practice by employers.

5. One question which almost always appears in employment applications used by firms of all sizes and, as far as I am aware, all firms engaged in sensitive work involving Trade Secrets or Governmental projects involving classified information, is "List each of your prior employers since you were 18 and indicate, for each, your reasons, for leaving. If you left because you were fired or if you left because you were threatened with being fired, please explain the circumstances below, including any court actions and decisions which may have been involved."

6. While the precise language may vary, the above question is asked by virtually all companies I am familiar with and certainly Defense Contractors and major other employers, such as airlines, to whom employee conduct information is considered essential in the process of determining whether to hire or not. Moreover, many companies and government agencies conduct in-person interviews and employ detectives to check the background of Applicants.

7. I can say that, almost without exception, any applicant for employment who answers Yes to the question in No. 5 or its equivalent or when a check detects a firing or resignation under threat of firing (termed a "constructive discharge"), that information will be viewed very, very negatively by any potential employer, whether the position is sensitive or not. There are several reasons for this reaction, including (a) a general reluctance to hire anyone who has been fired or threatened with being fired, even if that decision was overturned by a court (b) the applicant is viewed by the employer as a potential "trouble maker" (c) concern

that the applicant is dishonest or otherwise prone to acting in a fashion which can harm the employer's reputation.

8. There are other reasons in addition to those in #7. However, the important point is that being fired or resigning under threat of being fired, even if overturned by a court or similar entity, is a major "Red Flag" and, in my experience, makes it almost impossible for the applicant to secure employment with major companies, defense contractors, airlines, law enforcement agencies or with agencies of federal, state or local governments in any area where security or honesty are important.

9. In other words, such an applicant will be doomed to jobs of the lowest rank and minimum wage pay, such as the "flipping hamburgers" type.

10. Finally, it should be kept in mind that a person who is fired or resigns under threat of firing will have this information follow him or her during the rest of his or her life because computers store such information forever. Therefore, the individual involved in such a matter carries a lifetime stigma, a kind of brand on the forehead, which cannot be eradicated.

11. Moreover, if a person's firing is overturned by a court or administrative agency, that is viewed even more negatively by most employers because they perceive anyone who is fired as dishonest or a law breaker and certainly as a "trouble maker" and the court decision is then viewed as proof that the individual is the kind of person who will sue his or her employer, and employers definitely do everything possible to avoid being sued by employes. In short, court decisions favorable to the actually employee

amplify the harm of the original firing or resignation under threat of firing.

12. In making this Declaration, I understand that it may be used in litigation, but I do not know the names of the opposing parties or the facts involved other than I have been advised that a Federal Law Enforcement Agent is being threatened with employment termination based on an alleged personnel manual violation. Assuming that this is correct information, a terminated Federal Law Enforcement Agent would have essentially no prospects of ever being hired for any position of responsibility by any employer of stature.

DECLARATION

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true and further that these statements were made with the knowledge that willful false statements and the like are punishable by fine or imprisonment, or both, under section 1001 of Title 18 of the United States Code.

/S/ Edward Armintrout

_____

Edward Armintrout

December 20, 1997

armdec

TRO HEARING 3/23/98, TR 10-11 [EXCERPT]

MR. PEASE: The Government's reaction, your Honor, is that we're not -- we're not standing before this Court saying that this agreement was signed by a junior DEA lawyer who didn't have authority to sign it. Our position is a legal one that this Court can decide without Mr. Bayless' testimony and that is that no one can bind the Government to an illegal contract, a contract that is void as against public policy. And so the chain of events, who said what to who and who signed what when is not disputed here. What is disputed is that that contract requires the DEA to be a party to certain illegal conduct and that's spelled out in the brief and we can discuss that today.

And so our position is we're not -- we're not saying that Mr. Bayless didn't have reason to think that the people he was dealing with were authorized, so we're not disputing that, so I don't believe there's any reason for the testimony on that subject.

This Court can and should look at that contract and decide as a matter of law that it cannot be enforced and that there is no likelihood of success on the merits.

TRO HEARING 3/23/98, TR 16 [EXCERPT]

This case is not about whether he gees to resign or be fired, this case is about whether or not the terms of an illegal contract are going to be enforced against the Government. There's no problem with the plaintiff resigning. He has -- certainly he can resign. The question is can he force the DEA to comply with en illegal contract, that's why we're here. We're not here about forcing money into a bank account. It's got nothing to do with this case. This case is about whether or not that contract binds the DEA to an illegal agreement.

TRO HEARING 3/23/98, TR 36 [EXCERPT]

Bayless – Direct

THE WITNESS: We don't have a copy of Ms. Martin's affidavit which we felt was essential. We were also denied the right to interview Ms. Martin or any other witnesses in Ohio, we were expressly prohibited from doing that by Mr. Greenley whom I contacted to request the right to go to Ohio. Mr. [DOE] had been told that criminal charges would be brought against him in very broad terms and I told Mr. Greenley that we were concerned that that applied to his agents as attorneys and he told me that that was in fact the truth.

MR. PEASE: Object, objection.

THE COURT: Sustained, sustained. Motion move to strike?

MR. PEASE: Move to strike.

THE COURT: So ordered. Totally irresponsive, not responsive to the question, irrelevant, no foundation, hearsay.

LETTER FROM RESPONDENT GRUDEN, MARCH 12, 1998

U.S. Department of Justice
Drug Enforcement Administration
Washington D.C. 20537
1 2 MAR 1998

Stuart S. Bowie, Esq.
206 Knoll Road
Wallingford, PA 19086

Dear Mr. Bowie

Please be advised that I intend to forestall taking any action with respect to the pending proposed removal action against Specie1 Agent [DOE] until on or after April 1, 1998. As previously indicated, you will receive 72 hours advance notice of any such action.

If you have any questions regarding this matter, please contact me at (202) 305-8120.

Sincerely,
/s/ Peter F. Gruden
Special Agent in Charge

BY FACSIMILE
610/ S65-2125
cc: Herman Bayless, Esq.
BY FACSIMLE: 508/ 347.1315
AUSA John J. Pease
BY FACSIMILE: 215/ 451-5349

COMMITTEE ON NATIONAL SECURITY
RESEARCH AND DEVELOPMENT
CHAIRMAN

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515-3807

January 20, 1998

Mr. Thomas A. Constantine
Administrator
Drug Enforcement Administration
600-700 Army Navy Drive
Arlington, Virginia 22202

RE: Special Agent [REDACTED]

Dear Mr. Constantine:

In reply to your telephone inquiry, Mr. [REDACTED] is aware of the "letter" to which you refer As [REDACTED] described it to me, it was written in 1996 to a female, over the age of consent and suggests a liaison.

[Redacted] flatly disputes what you have been told by your employees, regarding the interviews of the two people, who gave affidavits. [Redacted] was, I am informed, sternly warned at the end of his deposition not to contact these two people, but also, not to contact any of the folks" in the area, who might have information

Along the same lines, I am advised that the deciding officer, Mark Greenlee, expressly told Mr.[REDACTED]'s counsel, Mr. Bayless, that neither Mr.[REDACTED] nor his attorneys had any right to contact or interview those people.

I await your explanation of why the proposal to fire Mr.[REDACTED] does *not* specify which of the nine broad categories he is being charged with. I am advised that the case file clearly shows that the DEA concluded it had no sufficient basis to assert that any state or federal crimes where committed. The DEA should concede this to Mr.[REDACTED]'s attorney and specify the precise regulation, if any, he is charged with having violated. In addition the DEA should provide Mr. [REDACTED]'s attorney with whatever facts it has to support these specific charges.

Not only am I concerned that [REDACTED] is not being accorded due process, but I am also concerned about the allegations concerning SOD. [REDACTED] has sent me the enclosed pertaining to alleged activity at "X" {SOD) and I would ask that these be investigated on an emergency basis and answers be provided to me your report.

Finally, I would hope that no adverse action will be taken regarding [REDACTED] during the investigation of these matters.

Sincerely,

/s/ CURT WELDON

Member of Congress

DECLARATION

1. On March 27, 1998 I, Carmelo J. LoParo, a Licensed Private Investigator in the State of Ohio and former FBI Agent, and John R. Billi, also a Licensed Private Investigator in the State of Ohio and former FBI Agent, were retained by [REDACTED] to investigate statements allegedly made to DEA Investigators in an affidavit she allegedly signed in 1997 regarding the off-duty conduct of [REDACTED] in his rented room in 1993 which Michelle Martin allegedly observed.

2. On March 30, 1998 at approximately 5:30 PM, Mr. Billi and I went to the last known address of Michelle Martin at 345 Butternut Lane, Berea, OH in order to determine if Michelle Martin was still living there and, if so, whether she would agree to be interviewed about her DEA affidavit. Public records indicate that her mother, Janet Martin, resides at that address at the present time.

3. We were met at the door of the residence by a woman approximately 50 years old who answered "yes" when asked if she was Mrs. Janet Martin. As soon as we identified ourselves to Mrs. Martin and explained the purpose of our visit, she stated "I was called by the FBI a couple of weeks ago and warned that you people might be coming around here." We asked if she could recall the names of the "FBI" caller, to which Mrs. Martin advised that it was the same male "FBI" investigator that interviewed her and her daughter during the investigation. We asked Mrs. Martin if she knew the difference between the FBI and the DEA, and she shook her head negatively indicating that she did not.

4. Mrs. Martin asked that we leave her and her daughter alone. She became visibly upset and began to cry. Mrs. Martin asked why this was "all being brought up again", and we informed her that [REDACTED] was presently facing discharge from his employment.

5. Mrs. Martin asked us to leave and please not return or attempt to interview her daughter in the fixture. We adhered immediately and politely to her request.

6. We do not know if Michelle Martin was at the residence at the time of our visit, nor do we know of her present whereabouts.

DECLARATION

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true and further that these statements were made with the knowledge that willful false statements and the like are punishable by fine or imprisonment, or both, under section 1001 of Title 18 of the United States Code and by the laws of the State of Ohio.

March 31, 1998

/s/ Carmelo J. LoParo